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REPORTS

OF THE DECISIONS OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO,

INCLUDING THE JANUARY TERM AND PART OF THE
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**JUDGES OF THE COURT OF APPEALS
OF THE STATE OF COLORADO.**

ADAIR WILSON, PRESIDENT JUDGE.

**CHARLES I. THOMSON, }
JULIUS C. GUNTER, } JUDGES.**

CHARLES C. POST, ATTORNEY GENERAL.

JAMES PERCHARD, CLERK.

JOHN A. GORDON, REPORTER.

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF

THE UNIVERSITY OF OXFORD

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REPORTS
OF THE
DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO.

January Term, 1902.

[No. 1978.]

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18 40

HAZELTON V. PORTER ET AL.

Corporations—Failure to File Annual Report—Liability of Directors—Limitation.

The liability of directors of a corporation, under section 491, Mills' Ann. Stats., for failure to file the annual report as therein required is a statutory penalty and is barred by the statute of limitations one year after the penalty is incurred, and the statute begins to run at the time of the default of the directors and not at the time the debt against the corporation matures or is made payable.

Error to the District Court of Arapahoe County.

Messrs. BENEDICT & PHELPS and Mr. HORACE PHELPS, for plaintiff in error.

Mr. CHARLES H. TOLL and Mr. WILLIAM R. BARBOUR, for defendant in error, Henry M. Porter.

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(1)

MR. W. C. KINGSLEY, for defendants in error,
Moritz Barth and Leonard H. Eicholtz.

WILSON, P. J.

In 1890 the plaintiff Hazelton contracted with The Denver Steam Heating Company, a corporation organized and doing business under the laws of Colorado, to erect and construct for it a boiler for steam heating purposes. In February, 1891, the work was completed, and the boiler after having been tested in accordance with the agreement, was then accepted by the company, at the same time the price to be paid therefor being agreed upon and fixed by the parties, to be paid monthly in installments of certain sums thereafter, the time of payment extending over a period of several years. The corporation did not within sixty days from January 1, 1891, file nor cause to be filed its annual report as required by section 491, Mills' Ann. Stats., section 252, Gen. Stats., nor was any such report filed at any time thereafter prior to the bringing of this suit, nor had there been previous to March 2, 1891; nor was there at any time thereafter filed a certificate of the paid-up capital stock of the corporation. The defendants were during all of the times mentioned directors of the corporation, and this action, commenced January 30, 1897, was brought to recover the amount of the debt from them, on account of their personal liability incurred for failure to make such report. Section 491 referred to reads as follows:

“Every such corporation shall, annually, within sixty days from the first day of January, make a report, which shall state the amount of its capital and the proportion actually paid in, and the amount of existing debts; which report shall be signed by the president, and shall be verified by the oath of the president or secretary of said company, under its cor-

porate seal, and filed in the office of the recorder of deeds of the county where the business of the company shall be carried on. And if any such corporation shall fail so to do, unless the capital stock of such corporation has been fully paid in, and a certificate made and filed as provided in section twelve (12) of this act, all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should, by this section, have been made and filed, and until such report shall be made."

None of the allegations in the complaint with reference to the contracting of the indebtedness are disputed, and it is not denied that there was a failure to make the annual report required by the statute. It is claimed, however, that this action is barred by the statute of limitations, which reads as follows:

"All actions and suits, for any penalty or forfeiture of any penal statute brought by this state, or any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense is committed, and not after that time."—Section 2907, Mills' Ann. Stats., section 2170, Gen. Stats.

The plaintiff concedes, it having been so expressly decided by the appellate courts of this state, that section 491 is a penal statute, and that the limitation statute which applies to actions under it, is that which we have just quoted. The sole question to be determined is: When, under the facts of this case, did the limitation statute begin to run? It is claimed by the plaintiff that it did not begin to run until a cause of action accrued to him against the company for the collection of the debt. The defendants insist that the statute began to run at the time when the default of the directors occurred, which made them liable for

a penalty, it being in this case, under the conceded facts, March 2, 1891. In this contention we believe that the defendants are correct.

Counsel for plaintiff have made a very able and forcible argument in support of their theory, but in our opinion, the question is definitely settled against them not only by the plain reading of the statutes, but by the express adjudications of both appellate courts in this jurisdiction. It will be observed that the penalty imposed by section 491 is twofold in its character: First, for all debts of the company contracted during the year next preceding the time when such report should have been made; and second, for all debts which might be thereafter contracted, until the report should be made. The statute says nothing about the maturity of the debts. This question was under consideration by this court in a case very recently decided.—*Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 369.

We there declared the true doctrine to be that a debt is contracted when in consideration of value received by the corporation, a payment is to be made, no matter whether at once or at a future period. When, therefore, in this instance, the corporation failed to make its annual report on March 2, 1891, the directors instantly became liable for the whole of the debt due to the plaintiff. At that time a cause of action arose, in favor of the plaintiff and against these defendants, for the collection of this penalty imposed by law. The universal rule is that a statute of limitations begins to run when the right of action which is embraced in its provisions, accrues, and the running of the statute is not arrested except by certain well recognized circumstances, which there can be no pretense of obtaining in this case, and which is not claimed. No fraud nor concealment is alleged. This court in *C. F. & I. Co. v. Lenhart*, 6 Colo. App. 515,

said in considering this section: "When the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues, and the statute is set in motion, and does not stop until the action is commenced or barred." We do not think language could be plainer. To the same effect is *Clough v. R. M. Oil Co.*, 25 Colo. 528, also in a case involving the construction of the same section. The liability of the director does not arise from any promise to pay, express or implied, or from any contractual relation whatever. The law imposes it upon them as a penalty for an offense committed by them in disobeying its mandates, and the measure of the penalty is the amount of the indebtedness contracted during the preceding year.

Plaintiff insists that this construction of the law would enable directors to evade it by the simple device of so arranging that debts contracted shall not become due until more than one year after the time when their next annual report is required. We see no force in the argument. It is not to be presumed that either party had in contemplation at the time when the debt was contracted, or at any time, that there would be such a failure to do something which would impose a personal liability upon the directors, when they could so easily escape it by causing a report to be made. However, if the creditor had it in contemplation, he might have insisted that the times of payment should be fixed to give him the benefit of the happening of such an event if it should happen. Moreover, we do not have before us the question as to whether the plaintiff by reason of defendants' default, could have maintained a suit against them before the debt had matured so as to give him a cause of action against the company. That question is not in the case. We are simply holding that in this case for a failure of

the defendants to have caused the annual report of the company to have been filed on or before March 2, 1891, a cause of action accrued to plaintiff against them for the penalty prescribed in section 491; and the measure of that penalty, for the recovery of which plaintiff then became entitled to sue, was the amount of the debt involved in this action; and that such being the case, the limitation statute then began to run, and continued without interruption for one year thereafter, when the bar of the statute was complete. If this works any hardship, the responsibility must be with the legislature, and not with the courts.

Again, this debt was owed by the corporation, and not by the defendants. It was recoverable from the latter as a penalty, and not as an indebtedness, and they are therefore under all authorities, entitled to a strict construction of the statute.—*C. F. & I. Co. v. Lenhart, supra*; *Larsen v. James*, 1 Colo. App. 319.

It must be confessed that in *Larsen v. James, supra*, there are some indefinite and obscure expressions which might be construed to favor the contention of appellant. An examination of the case will show that it did not involve the question which is the vital point of this case. The only issue there presented was whether the six-year or one-year statute of limitations to actions applies under a statute similar to that now under consideration. In such case the language used, whatever its construction, cannot be considered of any binding force or effect. Especially is this true since thereafter the question was squarely presented to this court in *C. F. & I. Co. v. Lenhart, supra*, and was decided in accordance with the views which we have expressed.

As this court said in *Thatcher v. Salomon, supra*, directors of corporations in view of the special privileges granted to them should be held to the

strictest observance of all the duties and obligations imposed upon them by law. There is no room, however, for judicial construction when the provisions of the statute are expressed in plain and unambiguous language, and creditors and directors alike must take notice. If under its terms circumstances might arise wherein it might seem to work a hardship or injustice, the remedy is with the legislature alone.

The judgment is affirmed.

Affirmed.

[No. 2026.]

BALDWIN ET AL. V. THE CENTRAL SAVINGS BANK.

1. **Contracts—Settlement by New Contracts—Evidence.**

Where a contract was settled and supplanted by a new contract, all questions as to the validity of the old contract were adjusted by the settlement, and in an action upon the new contract, evidence tending to impeach the validity of the old contract was inadmissible in defense in the absence of proof of fraud or mistake in the settlement.

2. **Same.**

Where one party to a contract assigned all her interest therein to a bank for the purpose of securing a debt owed by her to the bank, and the bank and the other party to the contract entered into a new contract in settlement of the old one, in an action by the bank upon the new contract, evidence of a conversation between plaintiff's cashier and defendant relating to the debt owed by the assignor to the bank was properly excluded in the absence of a showing of its materiality.

3. **Principal and Agent—Evidence—Declarations of Agent.**

The declarations of an agent are not admissible in evidence against his principal unless made with reference to business in which he is authorized to act, and at the time of its transaction.

4. **Practice—Instructions—Mathematical Computation.**

Where the amount of recovery, if any, is merely a matter of mathematical computation, it is not error for the court to make the computation and instruct the jury, if they find for plaintiff, they should estimate the damage at a specified sum.

5. **Measure of Damage—Bills and Notes—Presumption.**

In an action for damage for breach of contract by failure to deliver certain securities, where the securities consisted of se-

cured promissory notes, the presumption is that the securities are worth their face value.

6. Instructions—Measure of Damage.

Where the court had already instructed the jury that if they found for plaintiff they should estimate the damage at a specified sum, an instruction requested upon the measure of damage was properly refused.

7. Instructions.

It is not error to refuse to give instructions requested if they are substantially given in other instructions.

8. Tender.

In an action for damage for breach of contract in failing to deliver certain securities where the complaint alleged a demand of the securities and an offer to pay the agreed price and a refusal by defendant to deliver the securities on the ground of the invalidity of the contract and defendant's answer admitted the demand and offer to pay but denied any agreement of any kind with plaintiff, a tender by plaintiff of the amount agreed to be paid for the securities was not necessary to sustain plaintiff's action.

9. Statute of Frauds—Pleading.

In an action for damage for breach of contract, where the complaint fails to disclose whether or not the contract is in writing, if the defendant desires to avail himself of the statute of frauds, he must specially plead it.

Appeal from the District Court of Arapahoe County.

Messrs. CARPENTER & MCBIRD and Mr. WILLIS B. HERR, for appellants.

Mr. A. J. RISING, for appellee.

THOMSON, J.

The complaint of the appellee alleged that the appellants were copartners, doing business under the firm name of The Wabash Cattle Company; that on the 27th day of June, 1897, the defendants delivered to Mrs. M. J. Mills, at or near the city of Denver, 392 cattle, under an agreement between them and Mrs. Mills that the latter should drive the cattle into the county of Grand, and turn them upon the range in that county, and that, in the fall of 1897, and at the

time of marketing certain cattle described in a chattel mortgage theretofore given by Mrs. Mills to the defendants, she should have the privilege of buying the cattle first mentioned at the price of twenty dollars per head, of which five dollars should be paid in cash, and the residue in a note secured by a chattel mortgage on the cattle, or if Mrs. Mills should decline that privilege, and the cattle should be sold to other persons for cash, then she should receive the excess realized for the cattle over twenty dollars per head, but if the sale to such other persons should be on time, then she should receive, in cash, one-half of such excess; that she fully performed her agreement; that on the 6th day of November, 1897, the defendants sold 369 of the cattle, on time, for \$9,257.87; that Mrs. Mills was then indebted to the plaintiff in the sum of \$3,169.30 on a promissory note made by her; that on the 22d day of November, 1897, for the purpose of securing the payment of that note, she assigned to the plaintiff all her interest in her agreement with the defendants, and the profits accruing to her from the agreement; that on the 23d day of November, 1897, the plaintiff notified the defendants of the assignment, and about the same time, for the purpose of a settlement of Mrs. Mills' claim under the agreement, proposed to them that they should deliver to it the notes and securities taken by them in payment for the cattle, and that it would pay them for those notes and securities the aggregate sum to which twenty dollars per head for the cattle would amount, which offer was then accepted by them; that they were not then in possession of such notes and securities, but that afterwards, when they had come into such possession, the plaintiff demanded of the defendants, and they refused, the performance of their agreement with it, the reason given for the refusal being that the contract with Mrs. Mills was invalid.

The answer of the defendants admitted the sale of the cattle as alleged in the complaint; the offer of the plaintiff to pay them twenty dollars per head for the cattle; its demand on them for the securities, and their refusal to receive the money or deliver the securities; and admitted by not denying that the reason for their refusal was that the contract with Mills was invalid. All the other allegations of the complaint were denied.

At the trial the plaintiff proved the assignment, and produced testimony that on the 24th day of November, 1897, there was a meeting between Willis M. Marshall, cashier of the plaintiff, and C. O. Howe, one of the defendants, at which an agreement was reached between Marshall and Howe that in settlement of the claim of Mrs. Mills, the bank would carry out the contract of Mrs. Mills so as to make the sale a sale for cash, and would pay the defendants a sum, in cash, equal to twenty dollars per head for the cattle, and the defendants should turn over to the plaintiff the notes and securities they had received for the cattle, the notes to be assigned without recourse. This testimony was contradicted by the witnesses for the defendants. The verdict was for the plaintiff, and if the evidence was properly submitted to the jury, and there was no prejudicial error at the trial, their opinion upon the facts concludes us.

A number of offers were made by the defendants to prove that the contract between Mrs. Mills and them was different from that alleged by the plaintiff, and that at the time of the assignment to the plaintiff, the defendants owed her nothing; but the court refused to receive the evidence. It is urged that the refusal was error. The suit was upon the alleged agreement between the plaintiff and the defendants, and not upon that between Mrs. Mills and the defendants. Her claim under the latter agreement had

been assigned to the plaintiff; as assignee, the plaintiff approached the defendants for a settlement of that claim; the defendants accepted the plaintiff's proposition, and agreed, in consideration of its promise to pay them a certain sum of money, to turn over to it certain notes and securities; they afterwards refused to perform their agreement. The contract between Mrs. Mills and the defendants was supplanted and satisfied by a new contract between the plaintiff and the defendants; the terms and conditions of the first contract were set forth in the complaint, not for the purpose of a recovery upon that contract, but for the purpose of description, so as to show what contract it was that was assigned to the plaintiff and afterwards displaced by the new agreement. By the settlement they recognized the claim under the agreement with Mrs. Mills as valid and subsisting, and the settlement can not be impeached, except by proof of fraud or mistake. All questions concerning the validity and terms of the contract with Mrs. Mills, were adjusted by the parties when they made their settlement. The purpose of this suit is to enforce that settlement. No proof was offered that it was accomplished without a full knowledge, on the part of the defendants, of all the facts, or that they were influenced by any unfair practices of the plaintiff; and the evidence, by which it was sought to go behind the settlement and open up questions which the parties themselves had adjusted, was properly rejected.

The defendants complain that the court refused to receive, in evidence, a conversation between Mr. Marshall, the plaintiff's cashier, and Mr. Howe, some time in November, which, it was asserted, related to the debt owing to the plaintiff by Mrs. Mills. This was not the conversation, or part of the conversation, which resulted in the agreement between the plaintiff and the defendants. What time in November it

took place, does not appear. But inferentially it occurred before the assignment by Mrs. Mills to the plaintiff. If so, the plaintiff was not then the owner of her claim; and in what respect the conversation was material or relevant, or could be made material or relevant, to the issue, we are unable to conjecture. If it occurred after the agreement between the plaintiff and the defendants was concluded, it was certainly inadmissible. The transaction in which the cashier represented the bank being closed, the latter was not bound by his utterances. The declarations or acts of an agent are not admissible against his principal, unless they are made with reference to business in which he is authorized to act, and at the time of its transaction.—Greenleaf on Evidence, § 131; Wharton on Agency, § 162; *Tootle v. Cook*, 4 Colo. App. 111.

There was nothing in the question propounded to indicate that the answer would, or might, be relevant or material, and as counsel made no statement of what he proposed to prove, and offered no explanation from which it could appear that the evidence might become material, its exclusion was not error.—*Farwell Co. v. McGraw*, 13 Colo. App. 467.

The court instructed the jury that if they should find for the plaintiff, they should estimate its damages at \$1,877.87. Counsel say that the amount of recovery was for the determination of the jury, and that it was error to take the question from them. The answer admitted the sale of 369 head of cattle for \$9,257.87. A verdict for the plaintiff meant that the plaintiff was entitled to the difference between this sum of \$9,257.87 and \$7,380.00, the price of the cattle at twenty dollars per head. What that difference was, was mere matter of computation, and was not a question for the jury at all. It was exactly \$1,877.87, and the court properly so told the jury.

Of the remaining instructions, the objection to

one is that it said to the jury that allegations of the complaint were admitted by the answer which that pleading denied. Such was not the fact. Nothing which was not explicitly admitted, was stated in the instruction to have been admitted. The same objection is made to the other, and is equally foundationless. To the latter, however, an additional objection is made that it assumed that the contract between the plaintiff and the defendants was not within the statute of frauds. The defendants offered an instruction, which was refused, that the agreement was within the statute of frauds. The argument on both sides deals largely with the question whether the agreement was obnoxious to that statute; and, after disposing of some other matters, we shall address ourselves to that question.

The defendants asked an instruction that if the plaintiff was entitled to a recovery, the measure of his damages was the difference between the value of the securities to be delivered, and the price of the cattle at twenty dollars per head. Upon the facts, the presumption is that the securities were worth their face.—*Fenton v. Perkins*, 3 Mo. 23; *Davies v. Stevenson*, 59 Kan. 648; *Thayer v. Manley*, 73 N. Y. 305; see also *Hallack L. & M. Co. v. Gray*, 19 Colo. 149.

If the instruction had so stated, it would have been unassailable; but it also would have been unnecessary, because the court had already, by computation, ascertained the exact difference between the face value of the securities and the price of the cattle, and directed the jury, if they should find for the plaintiff, to estimate his damages at the sum so ascertained. The remaining request was properly denied, because it was substantially embraced in another instruction.

It is contended that a tender by the plaintiff of the amount he had agreed to pay the defendants was

necessary to enable him to maintain his action. The complaint alleged that the plaintiff demanded the securities from the defendants, and offered to pay them the money to which the cattle, at twenty dollars per head, would amount, but they refused to comply with the demand, declaring that the contract with Mills was invalid, and they would refuse to recognize any of its stipulations. The answer expressly admitted the demand, the offer to pay, and the refusal to comply with the demand; but it denied any agreement of any kind with the plaintiff. The defendants are hardly in a position to object that there was no tender; and upon the admitted facts, a tender would have been useless. It certainly was unnecessary.—*Smith v. Lewis*, 26 Conn. 109.

Whether the agreement between the plaintiff and the defendants should have been in writing or not, is a question of which no decision is now necessary. The evidence was suffered to go to the jury without objection, and, ordinarily, where one party acquiesces in the introduction by the other of his evidence, he will not be afterwards heard to complain of the result. But for another reason the question whether the agreement was in writing, can not be raised by the defendants. As it did not appear from the complaint whether the agreement was in writing or not, it was incumbent upon the defendants, if they desired to avail themselves of the statute, to specially plead it. Such is the rule here, whatever may be the practice elsewhere.—*Hunt v. Hayt*, 10 Colo. 278; *Tynon v. Despain*, 22 Colo. 240.

It was not pleaded, and it would have been gross error to give the instruction which the defendants requested respecting the statute, or to sustain any of their objections, in whatever form made, based upon the statute.

Let the judgment be affirmed.

Affirmed.

THE GATES IRON WORKS v. THE DENVER ENGINEERING WORKS COMPANY.

1. Principal and Agent—Ostensible Authority of Agent.

Where a person holds out another to the public as having a general authority to act for him in the particular business in which he is engaged, third persons may safely deal with the agent in the transaction of such business. But no matter how extensive the agent's authority may be in the transaction of his principal's business, it is confined to that business, and the principal is not bound by any act of the agent outside the boundary by which the business is circumscribed.

2. Same—Agent to Sell Not Authorized to Buy.

The general agent of a manufacturing company whose business is to manufacture and sell mining machinery, has no apparent authority to buy such machinery for his principal. And one who sold machinery to such agent knowing his principal was engaged in the manufacture and sale of such machinery must, in order to bind the manufacturing company, show that the purchase was specially authorized by the company.

3. Same—Custom and Usage—Evidence.

The mode of transacting business by an agent may be affected, but the character or nature of the business cannot be changed, by custom or usage. In an action against a manufacturing company, located in Chicago and engaged in the manufacture and sale of mining machinery, for the value of mining machinery purchased by its agent in the city of Denver, a custom, amongst agencies handling mining machinery in Denver of purchasing goods from local companies is inadmissible as tending to establish the agent's authority to purchase the machinery for his principal.

4. Principal And Agent—Authority of Agent—Evidence—Harmless Error.

In an action against a company engaged in the manufacture and sale of mining machinery for the value of machinery purchased by its agent, it was error to exclude evidence offered by defendant that it knew nothing of the purchase having been made for it and that its agent had no authority to make the purchase, but where plaintiff failed to prove any authority of the agent to make the purchase, the error was harmless, as there was no issue to submit to the jury.

Appeal from the District Court of Arapahoe County.

Mr. WESTBROOK S. DECKER, for appellant.

MESSRS. CRANSTON, PITKIN & MOORE, for appellee.
THOMSON, J.

Action by The Denver Engineering Works Company against The Gates Iron Works. The complaint alleged that between the 26th day of November, 1896, and the 4th day of February, 1897, the plaintiff, at the request of the defendant, sold and delivered to the defendant certain goods, wares and merchandise of the reasonable value of \$685.92, which sum the defendant promised and agreed to pay to the plaintiff. The complaint further stated that, of the indebtedness so contracted, on February 18, 1897, the defendant paid \$100, and on March 27, 1897, \$250; and that no part of the balance was ever paid. The answer denied all the allegations of the complaint. At the close of the evidence, the court instructed the jury that their finding should be in favor of the plaintiff for the unpaid residue of the account, with interest. They returned their verdict accordingly. A motion by the defendant for a new trial was denied; and from the judgment entered upon the verdict, the defendant prosecutes this appeal.

The evidence showed that the headquarters of the defendant, The Gates Iron Works, were in Chicago, Illinois; that B. L. Berkey was its agent in Denver; that the property sold by the plaintiff, and with which it seeks to charge the defendant, was mining machinery; and that it was sold to Mr. Berkey, who bought it in the name of the defendant. It was not shown that Berkey had any actual authority from the defendant to purchase the machinery; or that the defendant derived any benefit from the purchase, or knew anything whatever about the use of its name in the transaction. So far as the record discloses, there was neither original authority nor ratification. The

sole ground upon which the liability is asserted is that the defendant clothed Berkey with an appearance of authority upon which the plaintiff had the right to rely. Respecting such appearance of authority, William J. Miller, the general manager of the plaintiff, testified as follows: "The sign on the office window stated: Gates Iron Works, describing the manufacturers, and underneath that, B. L. Berkey, Manager. That sign was there when the order for the goods was received. The sign stated: Mining Machinery of all Kinds."

The witness also stated that the defendant's letter head showed a picture of the machine shop, the names of the officers, and the following:

"Gates' Iron Works, Manufacturers of Gates' Rock and Ore Breakers and General Mining Machinery, 650 Elston Ave., Chicago, Ill., B. L. Berkey, Man'g'r, 422 Seventeenth St., Denver, Colo." He testified likewise, to the defendant's card, which, he said, contained a picture of its manufacturing establishment and machine shops, and the words and figures following:

"Gates Iron Works, Chicago, U. S. A. Mining Machinery of Every Description. Specialties: Gates' Rock and Ore Breakers. Steam Stamp Mills. Cyanide and Chlorination Mills. Complete Plants by Competent Engineers. 650 Elston Ave. B. L. Berkey, Manager, 422 Seventeenth St., Telephone No. 624, Denver, Colo." On further examination, the witness, in answer to the question, "What did you say was on the window?" answered: "The firm name and manufacturers, and B. L. Berkey, Manager." We quote from the abstract, the following additional statements of the witness:

"The Denver Engineering Works Company had no knowledge of the relations which Mr. Berkey bore to the Gates Iron Works, other than that furnished

by the letter heads and the sign on the office windows. Part of their sign was, manufacture of mining machinery. I think it said all kinds. I made no inquiry with reference to the authority of Mr. Berkey, from any one. What I relied on was simply the letter head and what was painted on the office, and their business card and circular. I saw their business card on the last trial, and Mr. Berkey gave us one or two. He sent us his card and brought us his cards. He sent circulars out announcing his employment by the company and the opening of his office. I think the card was with the circular. I do not remember whether I retained the circular."

The circular of which the witness speaks, was not in evidence; but it was, judging from the statement concerning it of the witness, something for which Berkey was responsible. It was shown that the letter head and card came from the defendant, and that the defendant knew that Berkey advertised himself as manager of its Denver office.

Discussing the question of the duty of third persons dealing with an ostensible agent, Mr. Mechem says:

"In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen, that the law indulges in no bare presumption that an agency exists; it must be proved or presumed from facts; that the agent can not establish his own authority, either by his representations or by assuming to exercise it; that an authority can not be established by mere rumor or general reputation; that even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent, therefore, whether the assumed

agency be a general or special one, are bound, at their peril, to ascertain not only the fact of the agency but the extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it."—Mechem on Agency, § 276.

In *Lester v. Snyder*, 12 Colo. App. 351, the foregoing was expressly approved. In the case at bar, Mr. Miller, the general manager of the plaintiff, who conducted the transaction in question, in its behalf, made no inquiry with reference to the authority of Mr. Berkey; and neither himself nor his company had any knowledge of the relations existing between Berkey and the defendant, except what was shown by the letter head, sign, card and circular. It was in reliance upon these that the property was sold.

Mr. Berkey was the general agent of the defendant at Denver; he was the manager of its Denver office. The defendant was bound by the acts of Mr. Berkey within his apparent authority. Where a person holds out another to the public as having a general authority to act for him in the particular business in which he is engaged, third persons may safely deal with the agent in the transaction of such business. But there is a limit to the authority of an agent, general or special, and the principal is not bound by his act outside of such limit. No matter how extensive the authority of an agent may be in the transaction of his principal's business, it is still confined to that business; and his act, outside of the boundary by which the business is circumscribed, would not bind his principal.—*Stewart v. Woodward*, 50 Vt. 78; *Bank v. R. R. Co.*, 13 N. Y. 599; *Richmond v. Greeley*, 38 Iowa 666; *Fougue v. Burgess*, 71 Mo. 389; *Edwards v. Dooley*, 120 N. Y. 540; *Navigation Co. v. Dandridge*, 8 Gill & Johnson 248; *McAlpin v. Cassidy*, 17 Tex. 450; Story on Agency, § 87.

Now, Mr. Miller knew that the defendant was en-

gaged in the manufacture of general mining machinery. He was so advised by the letter head. The sign on the window appears to have been substantially the same as the letter head. The card did not describe the defendant as a manufacturer, but presented a picture of its manufacturing establishment and machine shops, with the words "Mining Machinery of every Description"; and as Berkey was held out as the agent of a manufacturer, his apparent authority extended only to the sale of the goods manufactured by his principal. That the defendant allowed him to style himself its manager, is immaterial; because he could bind the defendant only in the management of the business in which it was engaged. There was nothing in the evidence of authority which Mr. Miller saw, and upon which he relied, to warrant him in assuming that Mr. Berkey had any authority to buy mining machinery. So far as appearances went—at least appearances for which the defendant was responsible—the purchase of mining machinery was no part of the defendant's business; and there was nothing to indicate that Mr. Berkey was empowered to act outside of its business. There was no apparent authority in Berkey to buy this machinery; and in order to bind the defendant by his contract, the burden was on the plaintiff to prove that the purchase was specially authorized by it.—*Mining Co. v. Fraser*, 2 Colo. App. 14.

While the plaintiff, in making the sale, relied exclusively upon the visible *indicia* of Berkey's authority, at the trial it undertook to prove a custom among agencies handling mining machinery in Denver, of purchasing goods from local companies. When or how the custom originated, or how long it lasted, is not stated, except that it prevailed in Denver, in the fall and winter of 1896 and 1897. We do not think this assertion of a custom requires very

elaborate discussion. Respecting the effect which custom or usage may have upon the manner in which an agent may transact the business of his principal, Mr. Mechem says:

“Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice. In order to give the usage this effect it must be reasonable; it must not violate positive law; and it must have existed for such a time, and become so widely and generally known, as to warrant the presumption that the principal had it in his view at the time of the appointment of the agent.”

It is only, however, the mode of transacting the business, which can be affected by usage. No man can be compelled, by custom, to alter the character of his business. Concluding the section from which we have already quoted, Mr. Mechem says further:

“Usage, however, can not operate to change the intrinsic character of the relation, nor will it be permitted as between the principal and the agent, or as between the principal and third persons having notice of them, to contravene express instructions, or to contradict an express contract to the contrary. So a usage not known to the principal, cannot operate to authorize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another.”

Aside from the fact that the custom mentioned

in the evidence here was not defined, it had no such term of existence as to make it binding on any one; but, waiving this objection, whatever may have been its nature and limits, it could afford no protection to the plaintiff. So far as the plaintiff knew, or had any right to believe, and so far as we know, or have any right to believe, the business of the defendant was confined to the manufacture and sale of mining machinery; and no custom, in any locality, where it sent an agent to act for it, could force it to do a different business. Presumptively, because it manufactured mining machinery, it did not desire to buy mining machinery; and no custom, however ancient or well-defined, could compel it to do so.

It seems that some time after the transaction in question, Berkey informed the defendant of his purchase as having been made on his own account, and the defendant proposed to assist him in doing an individual business, but there was no ratification. Proof was proffered by the defendant that it knew nothing of the purchases as having been made for it; that Berkey had no authority to make the purchase; and that it never, in any manner, recognized the purchase as having been made in its behalf; but the evidence was all excluded. Of course, the exclusion was error; but it can hardly be said that it worked harm to the defendant. The burden was on the plaintiff to prove the agent's authority and every fact which might tend to make his contract the contract of his principal; and in the absence of such proof, disproof by the defendant was unnecessary. Upon the evidence there was no question to submit to the jury; to this extent we agree with the court; but it was on the plaintiff's side that the failure was, and the judgment should have been for the defendant.

The judgment is reversed and the cause re-

manded for further proceedings in accordance with the views herein expressed. *Reversed.*

[No. 2020.]

McKINLEY v. BEGGS.

Bills and Notes—Evidence—Fraud—Burden of Proof.

In an action upon a promissory note by an indorsee where the note indorsed before maturity with evidence of the genuineness of the indorsement was introduced by plaintiff, a prima facie case was made, and evidence offered by defendant that the payee had not performed the services for which the note was given, and that the note was executed under a misapprehension on the part of the payor that the services had been performed, in the absence of a further offer of facts to show that the execution of the note was induced by fraud of the payee, was not sufficient to overcome the prima facie case and shift the burden to plaintiff to show a purchase for value in good faith before maturity, and the evidence was not admissible for the purpose of showing a want of consideration, and was, therefore, properly rejected.

Appeal from the County Court of Arapahoe County.

Mr. A. B. McKINLEY, for appellant.

Mr. HALSTED L. RITTER, for appellee.

GUNTER, J.

Certain mining companies employed Vernon Beggs as secretary; term six months beginning January 1, 1896; salary \$100.00 per month. Appellant, counsel for the companies, made the contract and, morally at least, guaranteed payment of the salary. Beggs began the services in the city of Denver. Late in February appellant went east, returning in August. During his absence the business of the companies, for certain reasons, proved unsatisfactory, and in July they closed their offices. Beggs, in response to a letter of appellant, met him in September for a settlement. At the meeting Beggs stated a certain balance due from the companies on salary. Part of

this appellant paid in cash, remainder by his note. Appellee sued upon this note and rested at the trial with its introduction, evidence of its genuineness and of its endorsement to him before maturity.

Defendant, appellant here, after showing above facts leading up to the note offered "To prove * * * that the services were not rendered by Vernon Beggs, the payee in the note, for which the note was afterwards given by Mr. McKinley, the defendant * * * under the misapprehension that the services had been rendered." This evidence the court rejected. Appellant closed and judgment went for appellee.

Appellant contends that this was an offer to show the note procured by fraud, that thereby the *prima facie* case made by appellee was overcome and the burden shifted to the appellee to show purchase for value in good faith before maturity, that this supplemental proof failing the judgment below was error.

Appellant cannot invoke this rule because the rejected offer was not necessarily an offer to show fraud. Beggs might not have rendered the services in payment of which appellant gave the note, that is, might not have performed his contract of hiring, yet the company might have owed him the amount of the note. Appellant might have executed the note under the belief that Beggs had performed such services, yet it would not necessarily follow that Beggs practiced a fraud on appellant to induce the execution of the note and that appellant was thereby induced to give the note. Fraud is not presumed, if relied on in the pleadings the facts must be fully stated which it is claimed constitute the fraud, if sought to be proven the facts must be given fully which it is contended amount to fraud. Here no offer was made to show that Beggs had falsely stated any fact to appellee for the purpose of inducing the execution of the note.

Beggs did not state nor was there any offer to show a statement by him that he had performed the services called for by the contract. No offer was made to show that the belief of appellant had been justifiably induced by a false statement of any fact by Beggs; no offer to show that the false statement of any fact by Beggs justifiably induced the execution of the note. Two years elapsed between the giving of the note and the institution of the suit thereon. It does not appear that during this time fraud was at any time charged in securing the note. This fact does not suggest a relaxation of the rule requiring the tender to disclose fully the facts which it is claimed constitute fraud. If the tender be considered an offer to show want of consideration it was properly rejected because the proof thereof alone would not have overcome the *prima facie* case of the appellee.

“The production of the instrument and proof that it is genuine, *prima facie* establishes his case; and he may there rest it.”—Daniel on Negotiable Instruments, vol. 1, 4th ed. § 812.

“Countervailing proof that the instrument was executed without consideration as between the original parties * * * does not impair the holder’s superiority of position and he may still rest his case upon the instrument itself, from which it will still be presumed that he acquired it in a manner entitling him to stand upon the vantage ground of a *bona fide* holder for value.”—Daniel on Negotiable Instruments, vol. 1, 4th ed. § 814; Randolph on Commercial Paper, vol. 2, 2nd ed. § 1028; *Tourtelotte v. Brown*, 1 Colo. App. 408, 29 Pac. 130.

The case made by the introduction of the note endorsed before maturity not having been overcome the court below was right in entering judgment for appellee.

Affirmed.

[No. 1943.]

THE NEW LA JUNTA AND LAMAR CANAL COMPANY ET
AL. V. KREYBILL ET AL.

1. Evidence—Voluminous Documents—Oral Evidence.

In order to prove how much water had been contracted and sold by certain water companies, where the records of the companies containing copies of all the deeds and contracts issued by the companies were before the court and the deeds and contracts numbered about eight hundred, it was not necessary to read all the deeds and contracts to get before the court their contents, but it was permissible for a witness who had examined the records of the company and computed from the deeds and contracts the amount of water sold, to testify orally as to the result of his examination. And the witness, being familiar with the deeds and contracts issued by the companies, and being shown a sample of the contracts and deeds, might testify that all the contracts and deeds were of similar import.

2. Same—Proof of Records.

Where two water companies had issued about eight hundred contracts and deeds for water which had been recorded in the offices of the clerks and recorders of three counties along the line of the canal, in order to prove the number of such instruments of record and the amount of water conveyed thereby, it was not necessary to introduce certified copies thereof, but a witness who had examined the records of the different counties for that purpose and counted the number of instruments on record and computed the amount of water conveyed thereby, could testify as to the result of his examination.

3. Evidence—Best and Secondary.

The rule requiring the best evidence is not inflexible, but yields in certain instances when the best evidence cannot be produced without inconvenience. Where the evidence desired is the result of voluminous facts, or of the inspection of many books or papers which cannot conveniently take place in court, secondary evidence is admissible.

4. Water Rights—Conveyances—Mortgages—Notice.

Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the

17 26
18 7
31 234

books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.

5. Water Rights—Parties.

Where a canal company sold water rights with a stipulation that when the capacity of the canal was sold, the ownership of the canal and other property and franchises of the company should vest in the water right owners and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operating the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system.

6. Water Rights—Conveyances—Ownership of Canal and Reservoir.

Where a canal company sold water rights with a stipulation that, when the capacity of the ditch was sold, the title to the canal should pass to the water right owners, and the company oversold the capacity of the canal, the title to an undeveloped reservoir connected with the canal and constructed by the canal company passed with the canal to, and vested in, the water right owners.

Error to the District Court of Prowers County.

MR. CHARLES J. HUGHES, Jr., for plaintiffs in error.

MR. CHARLES E. GAST and Messrs. ROGERS & SHAFROTH, for defendants in error.

GUNTER, J.

The Arkansas River Land, Reservoir and Canal Company, a corporation, owned and operated until April 4, 1891, what is known in evidence as "The La Junta and Lamar Canal." This canal, length 113

miles, is situate in the counties of Otero, Bent and Prowers. The Prince and King reservoirs are a part of the system, the Prince reservoir being simply a wide place in the ditch. Some use has been made of this reservoir for irrigation, none of the King reservoir. As early as 1890, water was turned into the King reservoir; it cannot, however, be utilized in its present condition for purposes of irrigation. Such was its condition at the time of the institution of the Hess suit mentioned *infra*, and at the time of the institution of the present action, its utility depends on future development. This system was sold under judicial process April 4, 1891, sheriff's deed being executed January 6, 1892. By mesne conveyances the system passed to The La Junta and Lamar Canal Company January 19, 1892. Prior to November, 1891, by contracts and deeds, water rights had been sold from the canal amounting to 977.4 cubic feet of water per second time. At the November term, 1891, of the district court of Prowers county a decree was entered restraining T. C. Henry, The Arkansas River Land, Reservoir and Canal Company from selling further water rights. This was upon the basis that the capacity of the canal having been over-sold, further sales therefrom were in violation of the water contracts and deeds. The new company, The La Junta and Lamar Canal Company, thereafter sold 73 additional water rights, calling for the delivery of 73 cubic feet of water per second of time. April 18, 1893, John Hess, in his own behalf and in behalf of all other owners of water rights in the canal, instituted suit in the district court of Prowers county against The La Junta and Lamar Canal Company to restrain the further sale of water rights by this company, contending as in the suit against its predecessor company, the capacity of the canal had been over-sold, also asking the appointment of a receiver and

for a specific performance of the water contracts and water deeds theretofore issued. On that date an injunction order was issued restraining the further sale of water rights, and on June 17, 1893, a receiver for the canal was appointed to operate it pending litigation. December 21, 1893, on final hearing the decree enjoining a further sale of water rights was made perpetual, a specific performance of the water contracts and deeds decreed and a receiver appointed pending appeal. The rights of the parties in the Hess suit were, and in the present action are, determined by the water contracts and deeds heretofore mentioned. These instruments provided that when the capacity of the canal should have been sold and two-thirds of the water rights so sold should have been paid for that the title to said canal should pass to the owners and holders of contracts for water rights in accordance with the prescribed plan. Further, that when this plan had been carried out the obligations of the company in respect to said ditch, and keeping the same in repair, or supplying water through the same, or any other ditch, canal or reservoir connected therewith, should cease. Further, that the canal when delivered to the water right owners under the above plan should be free of any debts against the same. The Hess case was tried to the court. In the decree appears *inter alia*, "And the court being now fully advised in the premises, doth find, that the capacity of the defendant's canal has been oversold, and that the plaintiff and the other holders of water deeds to be satisfied from the said canal and its reservoirs are entitled to a specific performance of the contract contained in their said deeds, and that they are equitably entitled to own and manage the said property.

It is therefore ordered, adjudged and decreed that the defendant company, by its proper officers, execute and deliver a proper deed of conveyance of

the said canal and its reservoirs, together with its property rights, priorities and franchises held in connection therewith, to such new corporation as the plaintiff and other holders of water rights in the said canal may organize for the purpose of operating and managing the said property; and in default of the defendant company so doing, let the clerk of this court execute such conveyance."

This decree was reviewed in *The La Junta and Lamar Canal Company v. Hess*, 6 Colo. App. 497; was modified merely as to the manner of transferring the canal and reservoirs, in all other particulars it was affirmed. An examination of the abstract and briefs in the case is convincing that this court held therein that the Prince and King reservoirs passed with the system to water right holders as the capacity of the canal had been oversold. In its opinion the court said: "The naked question in this case is whether the grantees are entitled to be treated as the owners of the property and have a right to insist on the formation of a new company according to the scheme outlined in their deed and to delivery of stock according to the terms of their contract. We conclude this time has arrived." In obedience to the remittitur in this case the district court of Prowers county, June, 1896, entered an amended decree in which appears *inter alia* the following: "The court doth find that at the time of the institution of this suit, the capacity of the defendant's canal to furnish water had been and now is oversold, and that the plaintiff and the other holders of water deeds to be satisfied from the said canal and its reservoirs are entitled to a specific performance of the contract contained in their said deeds, and that they are equitably entitled to own and manage the said canal and reservoirs, together with all the property rights, priorities and franchises held in connection therewith."

To effectuate this amended decree and to provide for a conveyance in pursuance thereof of the canal and reservoirs a corporation was formed June 3, 1896, entitled, "The New La Junta and Lamar Canal Company." Among its five incorporators and directors were, and continued to be until the date of the institution of the present suit, George E. Ross-Lewin, cashier of defendant bank, Keely, assistant cashier, and Patterson, receiver of The Colorado Securities Company. The La Junta and Lamar canal and adjunct reservoirs were conveyed to the new company, and the receiver, in pursuance of an order of court delivered over the canal to the new company. June 15, 1893, after notice had been given by plaintiff in the Hess suit, *supra*, that on June 17, 1893, an application would be made for the appointment of a receiver for the canal pending litigation, The La Junta and Lamar Canal Company, by its board of directors passed the following resolution:

"Whereas, The La Junta and Lamar Canal Company is justly indebted to The Colorado Securities Company in the sum of \$28,769.17 for moneys advanced by the said The Colorado Securities Company to this company, and paid out for its use, and the said The Colorado Securities Company having requested this company to better secure the payment of the same, Therefore, Be It Resolved, That the vice-president be authorized to execute a note to said The Colorado Securities Company, for said sum payable in thirty days from date, and that the vice-president and the secretary be authorized to execute a trust deed upon all of the company's reservoirs and canal to secure the same."

A note and trust deed were executed pursuant to such resolution. After maturity of the note it was transferred to The First National Bank of Denver, one of the plaintiffs in error. The present suit was

instituted December 21, 1896, to remove the lien of this trust deed as to the canal and reservoirs constituting the La Junta and Lamar canal system. Trial was had to the court and decree rendered July 2, 1897, in which appears *inter alia*:

“That prior to the fourth day of April, 1891, the said La Junta and Lamar Canal, together with its laterals, reservoir sites, known as the King and Prince reservoirs, and other property, was in control of and operated by The Arkansas River Land, Reservoir and Canal Company, subject to the water deeds and contracts then issued, to be satisfied therefrom, each right representing 1.44 cubic feet of water per second of time, flowing under a weir; that on or about the said fourth day of April, 1891, said property was sold, under judicial process, for the purpose of satisfying a certain indebtedness of the said The Arkansas River Land, Reservoir and Canal Company, and by certain mesne conveyances became and was vested in The La Junta and Lamar Canal Company; and that thereafter the said La Junta and Lamar Canal Company sold additional water rights therefrom.

“And the court further finds that at the time of the sale of said property, on or about April 4, 1891, said company, The Arkansas River, Land, Reservoir and Canal Company, had sold and had outstanding and in force a number of water rights evidenced by water contracts and water deeds more than equal to the estimated full capacity of said ditch to furnish water, and that at the time of the execution of the note and mortgage set forth in the complaint of The La Junta and Lamar Canal Company, the capacity of the said canal to furnish water, including the reservoirs as then developed, had been oversold.

“And the court further finds, that under the conditions as set forth in said contracts and deeds, the

owners of said water rights were then entitled to have conveyed to them, and were the owners, equitably, of the said canal, together with its rights of priorities, and said reservoirs, and the priorities of water thereto belonging, and that at the time of the execution of the trust deed and note in controversy, the said La Junta and Lamar Canal Company was without title, equity or interest in and to either the said canal or said reservoirs or their rights of priority to the use of water which could be the subject of a mortgage. That the defendants, George E. Ross-Lewin, A. E. Reynolds, Alfred E. Bent, Thomas Keely and Frank G. Patterson constitute the board of directors of The New La Junta and Lamar Canal Company; that The First National Bank of Denver is a corporation * * * and holds the note secured by the trust deed executed by The La Junta and Lamar Canal Company upon the said ditch and reservoirs * * * as collateral to secure to it payment of a certain indebtedness of The Colorado Securities Company, said note coming into possession of and being assigned to said bank after its maturity; that as directors of The New La Junta and Lamar Canal Company they were given possession of said canal property by an order of this court made and entered in the suit of John Hess and others v. The La Junta and Lamar Canal Company, and they have operated with the said The First National Bank of Denver to aid and enable it to collect said note or to make it a charge upon the said La Junta and Lamar canal and its reservoirs and water rights thereto appertaining, and by means of said trust deed to cloud the title of said canal property.

“Wherefore it is ordered * * * that said note and trust deed * * * be and the same in so far as it purports to be a lien against the said canal property, including its reservoirs, and against the owners

of water rights issuing therefrom, be and the same is hereby declared to be held null and void and inoperative, and that the same be cancelled as a cloud upon the title of said property as against the interest of these plaintiffs and those similarly situated."

The decree further enjoins the above directors and said bank from attempting in any manner to obtain payment from the said property or any part thereof by said pretended trust deed.

Defendants in error adduced oral and written evidence in support of the issues tendered by the pleadings. The only testimony tendered in behalf of plaintiffs in error was the above resolution of the board of directors, also one of date April 5, 1892.

To review last mentioned decree plaintiffs in error are here assigning seventy-three errors. These go:

First—To the admission of evidence.

Second—That defendants in error are without capacity to maintain this action.

Third—That June 15, 1893, the water right holders were not the owners of the King reservoir, that on such date it was owned by The La Junta and Lamar Canal Company, therefore, subject to the trust deed in question.

1. For the purpose of showing defendants in error to be the holders of water rights in the said canal and the number of water rights sold therefrom, certain deeds and contracts were produced and the books of The Arkansas River Land, Reservoir and Canal Company. Also books of The La Junta and Lamar Canal Company. These deeds were one from The La Junta and Lamar Canal Company to Gallady, dated August 23, 1892, recorded in the office of the recorder of Bent county September 13, 1892. This with the consent of grantor therein assigned to ap-

pellee Hasty July 10, 1893. The water right according to the terms of the deed was to be applied to land situate in Bent county. Deed from The Arkansas River Land, Reservoir and Canal Company conveying forty water rights in above canal, dated November 23, 1889, recorded in the office of the recorder of Prowers county November 29, 1889. The deed provided that the land upon which the water rights were to be applied was in Prowers county. Also mesne conveyances whereby certain parts of the lands embraced within the original deed and one water right were conveyed to appellee Cooper. Receiver Burke then produced the records of The Arkansas River Land, Reservoir and Canal Company and the records of The La Junta and Lamar Canal Company containing copies of all water contracts and water deeds issued by the two companies. It appeared that about 800 deeds and contracts had been issued conveying the right to 1,050.4 cubic feet of water per second. The witness having stated that he had made the computation from the company's records was asked as to the aggregate number of contracts and deeds and the aggregate number of cubic feet of water sold in the canal prior to April 18, 1893; also the number of feet sold by The Arkansas River Land, Reservoir and Canal Company. The witness, who showed himself familiar with the deeds and contracts issued by The Arkansas River Land, Reservoir and Canal Company, was handed a sample of the contracts and deeds and was asked as to whether all the contracts and deeds were of similar import and terms. It was not necessary to read the eight hundred deeds and contracts to get before the court their contents and the aggregate number of water rights sold, it was permissible saving of time for the witness to state the general result of his examination of these

contracts and deeds, copies of which were before the court in the books of the companies. Oral evidence thus received of the contents of these instruments is assigned as error. Elliott's General Practice, vol. 1, § 404, in discussing exceptions to the rule forbidding secondary evidence says: "Where * * * documents are very voluminous and all that is essential is a summary or calculation, a qualified witness may make it and give parol evidence thereof."

"When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination."—*Burton v. Driggs*, 20 Wallace 125; *Myer v. Sefton et al.*, 2 Starky 274; *Greenleaf*, 14 ed., § 563, h.

Further, the copies of the deeds and contracts were there before plaintiffs in error with full opportunity to examine and discover any error in the statement made by the witness and test the correctness of his statement upon cross-examination.—*Culver, administratrix, v. Marks*, 122 Ind. 554.

The Arkansas River Land, Reservoir and Canal Company and The La Junta and Lamar Canal Company had issued about eight hundred water deeds and contracts. Witness Kreybill testified to his having examined the records in the office of the respective recorders of Otero, Bent and Prowers counties to ascertain the number of such instruments of record and the number of cubic feet of water conveyed thereby. The purpose of his examination was to show that a large part of these contracts and deeds were at the time of the execution of the trust deed of record in the several counties. He was then asked to state the number of these water deeds and water contracts of record in the counties. His answer dis-

closed deeds and contracts calling for the delivery of 1,010 cubic feet of water per second of time. Error is assigned in permitting this question. To have proven the recording of each of the eight hundred instruments by the production and examination in open court of the eight hundred certified copies would have consumed much time, it could not conveniently have been done. The rule requiring the best evidence is not inflexible, it yields in certain instances when the best evidence can not be adduced without inconvenience. Where the evidence desired is the result of voluminous facts, or of the inspection of many books and papers, which cannot conveniently take place in court, or inscriptions upon monuments, secondary evidence is admissible, and are examples of the relaxation of the general rule.—Greenleaf, vol. 1, § 563, h, and authorities cited *supra*.

Further, its admission worked no prejudice; it was introduced for the purpose of showing that the bank in taking its trust deed did so with notice of the outstanding water contracts and deeds. With such notice it is charged other than by recording of all of such contracts and deeds.

“Knowledge of such facts as ought to put a prudent man upon inquiry as to the title charges a subsequent purchaser with notice of all facts pertaining thereto which diligent inquiry and investigation would have led him.”—*Jerome v. Carbonate Bank of Colorado*, 22 Colo. 37.

In applying this doctrine and charging a purchaser of an irrigating canal with notice of certain easements previously granted in the canal the supreme court in *Grand Valley Irrigation Company v. Leshner*, 28 Colo. 273, 65 Pac. 44, says:

“Added to the notice just given there was a physical evidence conveyed by the cultivated land,

the lateral ditches and the headgates all along the line of the ditch."

In *McClure v. Koen*, 25 Colo. 284, it was urged that the purchaser of an irrigation canal under a trust deed took the same without notice of Koen's rights in the ditch. Koen's rights had been used in irrigating certain lands. The court said:

"If we presume in the absence of any showing that the trustee acquired title without actual notice the open and notorious possession of plaintiff at the time was sufficient to put him upon inquiry and constituted constructive notice."

In this case The La Junta and Lamar Canal Company gave the trust deed in question; it was upon the entire system, running through the counties of Otero, Bent, Prowers and Kiowa. An examination of the records of all such counties was necessary to take the trust deed advisedly. Such examination would have disclosed water deeds and water contracts of record made both by the original company and The La Junta and Lamar Canal Company. The diligent inquirer would have been advised of the plan upon which both companies operated; he would have been advised that the purchaser of water rights, under certain conditions, was to become the owner of the canal, and of its adjunct reservoirs. The physical evidence conveyed by 113 miles of ditch, lateral ditches and cultivated land would have suggested to the prudent man to ascertain whether the capacity of the canal had been sold. A ready and convenient means of such information was the books of The La Junta and Lamar Canal Company and of The Arkansas River Land, Reservoir and Canal Company. Thereby he would have been advised that the capacity of the system had been sold prior to April 13, 1893, and that under the conditions of the deeds and contracts measuring

the rights of the parties The La Junta and Lamar Canal Company had parted with all interest in this system and had nothing to encumber June 15, 1893. By such facts The Colorado Securities Company was put upon inquiry and charged with consequent notice that the capacity of this canal had been oversold and the grantor in this trust deed had nothing to encumber in such canal system at the date of the execution of the trust deed in question.

2. Defendants in error and those for whom they sue as the holders of water contracts and deeds and the equitable owners of the canal and reservoirs have a direct and immediate interest in securing the relief sought by cancellation of the trust deed in question. The trial court has found that the directors of The New La Junta and Lamar Canal Company "Have operated with The First National Bank of Denver to aid and enable it to collect said note, or to make it a charge upon the said The La Junta and Lamar Canal, its reservoirs and water rights there-to appertaining, and by means of said trust deed to cloud the title of said canal property." There were no stockholders other than these hostile directors. Relief could be had only through action by the water right holders. *Henry v. Travelers Ins. Co.*, 16 Colo. 186, sustains the right of defendants in error in their own behalf, and in behalf of others similarly situated to institute this action; therein the court says:

"The ditch company, being a party to the action, might ordinarily be depended upon to defend against an attempt to obtain judgment against it and against its property to the amount of \$90,000.00 in excess of all just demands, and on account of claims and liens which had already been paid and discharged. But the petition shows that the parties seeking to obtain such judgment had fraudulently obtained control of the ditch company, its officers, agents and attorneys,

so that it would neither make nor undertake to make such defense. Under such circumstances, it is plain that the petitioner, Henry, being the owner and holder of \$10,000.00 of the bonds sought to be foreclosed, and also being the owner of a majority of the stock of the ditch company, and so an equitable owner of the larger part of the property which plaintiff was thus seeking to subject to false and fraudulent claims, liens and judgments, had a direct and immediate interest in the matter in litigation, and that he must be directly affected by the legal operation of the judgment sought to be obtained * * * Hence * * * he was entitled to intervene."

3. The Hess suit, *supra*, was instituted April 18, 1893, tried November 24, 1893, decree handed down therein December 21, 1893. The court therein found, "That the capacity of the defendant's canal had been oversold," and decreed, "That the defendant company, by its proper officers, execute and deliver a proper deed of conveyance of the said canal and its reservoirs." Appellant therein assigns error in the decree ordering transfer of the reservoirs and in its brief says: "What right had the court below to decree that we should convey this undeveloped reservoir, the King reservoir?" The decree of the lower court, as hereinbefore stated, was affirmed in decreeing that the reservoirs passed to the grantees under the contracts and water deeds. The present suit was instituted December 21, 1896; tried July 1, 1897, and decree rendered July 2, 1897. The evidence showing no change of conditions between April 18, 1893, and December 21, 1896, so far as the question of the King reservoir is involved, the finding of fact herein in the court below was, "That * * * on or about April 4, 1891, the said company. The Arkansas River Land, Reservoir and Canal Company had sold and had outstanding and in force

a number of water rights, evidenced by water contracts and water deeds more than equal to the estimated full capacity of said ditch to furnish water, and that at the time of the execution of the note and mortgage set forth in the complaint of The La Junta and Lamar Canal Company, the capacity of the said canal to furnish water, including the reservoirs as then developed, had been oversold." There was evidence to support such finding of fact by it we are concluded. In the Hess case the court declared the law as to the same deeds and contracts and as to the same finding of fact as exists in this case and in so declaring held that under such conditions the King reservoir passed with the ditch to those holding water rights. Following the law so announced we hold here that on June 15, 1893, the King reservoir was equitably owned by the holders of water rights and that The La Junta and Lamar Canal Company had no interest therein at the date of the trust deed in question. As The La Junta and Lamar Canal Company had no interest in the La Junta and Lamar canal and its adjunct reservoirs at the time of the institution of this suit, as the appellees, and those for whom they sued were at such time the owners of such irrigation system, the judgment of the lower court was right in decreeing at their instance the cancellation of the trust deed which clouded their title to such irrigation system.

Let the judgment below be affirmed.

Affirmed.

[No. 2054.]

FARRER V. CASTER.

1. Evidence—Correspondence.

In an action upon a contract for the sale of cattle where defendant denied the execution of the contract and also the ownership of the cattle, letters of a correspondence between defendant

and plaintiff relative to the place of delivery of the cattle in which defendant proposed a different place than the one named in the contract, were admissible in evidence to show the recognized relations existing between the parties at the time they were written.

2. Same.

Where the letters of a correspondence between plaintiff and defendant were introduced in evidence to show that defendant recognized his liability under a contract, all the letters of the correspondence, including those written by plaintiff as well as those written by defendant, were admissible.

3. Pleading—Evidence—Damages.

In an action for damages for the failure of defendant to deliver cattle according to his contract of sale, a complaint which set forth in a general way the expense and loss to plaintiff, might have been required to be made more specific upon motion, but, in the absence of such motion, evidence that plaintiff had paid out money for pasture on which to put the cattle when gathered and employed men to assist in searching the range for them, and that such expense was incurred by agreement with defendant's agent who represented defendant in the sale, was admissible.

4. Principal and Agent—Contracts—Estoppel.

Where plaintiff entered into a written contract with an agent of defendant for the purchase of cattle, and defendant received a copy of the contract in which the agent described himself as the agent of defendant, and also received an advance payment on the cattle, which he retained, and afterwards accepted payment for some of the cattle delivered under the contract, defendant is estopped to deny that the person assuming to act as his agent was authorized to do so.

5. Same—Disclaimer of Ownership.

Where plaintiff purchased cattle from an agent of defendant as belonging to defendant, and defendant accepted and retained money that was paid as part of the purchase price he cannot evade liability on his contract for a failure to deliver the cattle as agreed, by disclaiming ownership of the cattle.

Appeal from the District Court of Pueblo County.

Messrs. ARRINGTON & McALINEY, for appellant.

Mr. THOMAS H. DEVINE and Mr. HENRY F. MAY,
for appellee.

THOMSON, J.

This suit was brought by the appellee to recover damages for a breach by the appellant of the the following contract:

“Moab, Utah, 4-3, '97.

“Tom Farrer, by Amasa Larsen, his agent, has this day sold to G. M. Caster all his herd of cattle now being kept by Amasa and Thos. Larsen, allowing to the purchaser a cut of one-half of the yearling heifers and another cut of 15 from the remainder. The entire herd consists of about 200 head of cattle branded 21—. The cattle are all native Utah cattle, and before making any cut the purchaser may reject any cripple, sick, deformed or lump-jawed cattle. The price to be paid for the cattle is \$15 per head for all that are 12 months old or more at the time of delivery. Those under 12 months old at that time shall go with the calves and not be counted. The seller agrees to deliver the cattle in good condition at Thompson Springs, Utah, at any time between the 20th and 25th day of September, 1897. Received \$400 in advance, the balance to be paid when the cattle are delivered.

“Amasa Larsen, Agt.

“G. M. Caster.

“It is understood that all calves of the cows belonging in the cattle sold by Tom Farrer to G. M. Caster shall go with the cows.

“Amasa Larsen.”

The complaint set forth the contract, and alleged that at the time of its execution Amasa Larsen was the agent of the defendant, with authority to execute it for him; that the defendant refused to deliver the cattle as required by his agreement, and that the plaintiff was otherwise damaged. The answer denied the execution of the contract, and averred that one Mathias Hartman, and not the defendant, was the owner of the cattle; that the cattle were in Lar-

sen's possession under a lease from Hartman; that Larsen was not the defendant's agent, and had no authority to act for him; that at the time the contract was made, the plaintiff knew that Larsen was not the defendant's agent, and knew that Hartman was the owner of the cattle, and that the defendant sent the \$400, which he admitted he received from the plaintiff, to Hartman.

About the 20th day of May, 1897, the plaintiff received from Larsen seven cattle belonging to the herd he had purchased, and paid for them by a check for \$105, payable to the order of the defendant. In June following, he received two more cattle from the same herd, and paid for them by a check for \$30, payable to the order of the defendant. The cashier of the Wells, Fargo & Co. bank, at Salt Lake City, Utah, testified that the defendant was a regular depositor in that bank, and had an account there during April, May and June, 1897, and that he deposited the check for \$400, and the one for \$105 to his own credit in that bank. The check for \$30 appears, from the endorsement upon it, to have been deposited in the same bank. The defendant testified that he placed the proceeds of the \$400 check to the credit of Hartman, but the books of the bank contradicted him. Beyond admitting that he received the other two checks, he said nothing about them. Some correspondence between the plaintiff and the defendant, relating to the cattle, was in evidence. It consisted of a letter from Farrer to Caster, dated October 1, 1897; an answer by Caster to that letter; a further letter from Farrer to Caster, dated September 24, 1897, and Caster's reply, dated the next day. The implied assumption of this entire correspondence is that the contract was the contract of the defendant, and not that of some one else. The introduction of the correspondence was resisted on the ground, applied to

the whole, that the letters contained propositions looking to a compromise; and on the ground, applied to the last letter of the plaintiff, that it was merely a declaration of the plaintiff himself, and therefore not binding upon the defendant. We find nothing in the letters resembling an offer of compromise. As to the original contract, and the obligations of the parties under it, the letters contained nothing to indicate that there was any dispute or difference of opinion between the parties. The correspondence related to the place of delivery of the cattle,—Farrer proposing Seven Mile, instead of Thompson Springs, the place named in the contract,—and some minor matters in relation to delivery and settlement for cattle not delivered. So far as the contract itself and the rights of the parties under it were concerned, the letters showed no disagreement nor anything which could be the subject of compromise. They were offered merely to show the recognized relations existing between the parties at the time they were written, and they are couched in language too vague and indefinite to be evidence of anything else without further explanation. For the purpose for which they were offered they were properly admitted. The last letter of the plaintiff was admissible as part of the correspondence. A correspondence, like a conversation, consists of what both parties said in relation to the subject-matter. It is an entirety, and can be best understood by knowing it all.

The plaintiff testified that to facilitate the delivery of the cattle, he laid out money for pasture on which to put them as they were gathered, and employed men to assist in searching the range for them. He also stated that he incurred the expense of pasture and men—giving the amount—by agreement with Mr. Larsen, to whom he had been referred in the matter by the defendant; and that after he had

bought the pasture and started the men out upon the range, the defendant and Mr. Larsen refused to abide by the agreement. The defendant objected to the evidence of the agreement and the expense, for the reason that no special damages were pleaded. The complaint set forth, in a general way, the expense and loss to which the plaintiff testified. We think a motion to make the allegation more specific would have been sustained. But there was no such motion. The averment as it stood, was sufficient to let in the proof; and the testimony, being relevant and material, was properly admitted.

We do not think the defendant made his denial of Mr. Larsen's agency good. We do not see how he can escape from the facts. He received a copy of the contract, in which Larsen assumed to act as his agent, immediately after it was made. At the same time he received a check drawn by the plaintiff, and payable to his own order, for \$400. This check was acknowledged in the contract as an advance payment upon the purchase price of the cattle, which, by the terms of the instrument, he sold to the plaintiff. He did not disavow the agency or return the check. On the contrary, he kept the check, and deposited it in the bank to his own credit. He does not even now propose to return the money. His retention of the money, with full knowledge of the facts, is conclusive upon him that in making the contract, Larsen acted as his agent. But this is not all. Afterwards, for a few head of the cattle described in the contract which were delivered to the plaintiff, he received another check, payable to his order. He did not explain to the plaintiff that, not being the owner of the cattle, he was not entitled to the check. He pursued exactly the opposite course; he endorsed the check, and sent it to the bank, to swell his personal account. Evidently it had not occurred to him that Larsen

was not his agent. The plaintiff testified that the defendant never disclaimed ownership of the cattle until about the 23d day of September, 1897, and that he did so then only upon threat by the plaintiff to sue him if he did not perform his contract. The testimony of the plaintiff must be accepted by us as true, because the jury believed him. Outside of the estoppel by which the plaintiff is bound, the circumstances of the case, as they are disclosed by the evidence, strongly indicate that Larsen was, in fact, the agent of the defendant, with full authority to make the sale, and that the long delayed denial of the agency was a subterfuge. The verdict of the jury in the plaintiff's favor for \$854, was amply warranted by the evidence; and, in view of the facts, we think the amount quite modest.

There are forty assignments of error each of which refers us to some page of the bill of exceptions. We have not looked outside of the abstract which the defendant has furnished us. That is presumed to contain everything regarded by him as of importance to himself. We have carefully read this abstract, and have discovered no error committed at the trial. The instructions reflect our views of the law. On the question raised by the answer and the evidence concerning Hartman's ownership of the cattle, the instruction was, we think, too favorable to the defendant. By his agent, the defendant sold the cattle to the plaintiff. He sold them as belonging to himself, and took and kept money that was paid for them; and he can not evade liability on his contract by disclaiming their ownership.

There seems to have been an unsuccessful motion by the defendant to retax certain of the costs. We find no error assigned upon the ruling, and we

find nothing in the abstract to enable us to say that it was incorrect.

The judgment will be affirmed.

Affirmed.

[No. 2059.]

WILSON V. LUNT.

17 48
33a 190

1. Contracts—Leases—Assignment—Appraisement—Notice.

A lease of real estate fixed the rental value for five years, and provided that, at the end of five years, the rental should be fixed for the next five years at six per cent. per annum of the appraised value of the property to be appraised by three impartial property owners, one to be selected by each of the parties thereto, their heirs or lawful assigns or agents, and the two thus selected to select a third. The lessee assigned the lease with a stipulation that the assignee should assume all liabilities of the lessee. The lease was again assigned. At the end of the five years, an appraisement was made by appraisers selected by the lessor and the subsequent assignee then holding the lease, as provided in the contract. Held, that the first assignee was bound to the lessor for the rent as fixed by the appraisement, notwithstanding no notice was given him of the appraisement.

2. Same—Evidence—Waiver.

In an action by the lessor against the first assignee to recover rent as fixed by the appraisement, plaintiff began to offer proofs as to the details of the appraisement when defendant said there was no issue about the appraisement having been made, but that, as defendant had no notice of it, he was not bound. Held, a waiver of proof as to the details of the appraisement, except as to lack of notice to defendant, and that plaintiff was relieved of proving a return of the appraisement to the parties as required in the contract.

Appeal from the District Court of Arapahoe County.

Mr. OSCAR REUTER, for appellant.

Mr. A. M. STEVENSON and Mr. CHARLES J. HUGHES, Jr., for appellee.

Mr. HART BENTON, of counsel.

GUNTER, J.

Appellant leased to Timerman real estate for a term beginning February 7, 1887, ending February 7, 1912, he agreeing to pay the rent provided in the lease. This was \$100.00 per month for the first five years, for the residue of the term to be fixed by appraisal in this manner, "For the rest and residue of said term the rent from time to time shall be ascertained and fixed and determined and paid in the manner hereinafter stated; that is to say, that not less than thirty days prior to the expiration of the first five years of said term, the parties hereto, their heirs or lawful assigns, or the agents of them or either of them, as the case may be, shall each select one fair impartial property owner of the city of Denver, * * * to act as appraiser for the purpose of appraising and fixing the value of the above described lots * * * and the two so selected shall select another * * * to act with them in making the appraisal and valuation of the said property. The said parties so chosen shall thereupon without delay appraise the value of said ground at its then full cash market value, and they shall not less than ten days prior to the expiration of said period of five years make a return of their appraisal and valuation in writing, to each party, or the agent thereof as the case may be * * *."

"From the time of the expiration of the first period the rent of the said premises for the succeeding five years, shall be a sum equal to six per cent per annum of the valuation so found and returned as aforesaid, payable in monthly installments in advance as aforesaid."

Timerman assigned the lease to appellee Lunt in these terms: "Know all men hereby that for and in consideration of the matters hereinafter mentioned and the sum of \$750.00 to me in hand paid by Horace G. Lunt * * * the receipt whereof is

hereby confessed, I do hereby assign, sell and transfer unto the said * * * Lunt the annexed lease and all my right, title and interest in and to the leased premises and do hereby grant, bargain, sell and convey unto him the said * * * Lunt all my right, title and interest in and to the leased premises, and do hereby grant, bargain, sell and convey unto him, the said * * * Lunt, all my right, title and interest in and to the said * * * parcels of land in the within lease mentioned, the said * * * Lunt in consideration hereof to pay the owner of said property the rent reserved to be paid under and by virtue of said lease for and during the full term thereof, and to do and perform all things required to be done by me by the terms of said lease and to save and keep me harmless of and from any loss, liability or damage on account thereof.

“Signed, sealed and delivered at Denver, Colorado this 29th day of December, A. D. 1887.

“George W. Timerman.”

June 15, 1888, Lunt assigned the lease to The Denver Tramway Company. January 6, 1889, The Denver Tramway Company and its successors, by consolidation, assigned the lease to The Denver Auditorium Company. Before the expiration of the first five years of the lease an appraisalment of the property above mentioned was had between the lessor and the assign then holding the lease, The Denver Auditorium Company, and the rental value thereof, by such appraisalment, was fixed at \$600.00 per month. The rent so determined from February 7, 1892, to March 7, 1894, was paid by said The Denver Auditorium Company. The rent being in default for five months ending August 7, 1894, appellant instituted suit against appellee in the district court of said county to recover the amount of said delinquency, to wit, \$3,000. A general demurrer to the complaint

was sustained by the trial court, and plaintiff therein, appellant here, declining to amend, the action was dismissed. The case was reviewed and reversed in *Wilson v. Lunt*, 11 Colo. App. 61, 52 Pac. 296, the court in the course of its opinion saying: "We therefore conclude as the case is presented on the pleading, unless it should be modified by the proof, that the plaintiff may recover."

During the pendency of such action another suit had been brought by appellant against appellee for rent from August 7, 1894, to March 7, 1896, amounting to \$12,000. When above remanded action was again in the lower court as the pleadings therein were identical with those in said suit for \$12,000, except as to the time for which rent was claimed and the amount sued for, the actions were consolidated and so tried. Such trial was to the court upon the complaint as it stood in this court and upon the evidence adduced by the respective parties. The lower court on the retrial found the allegations of the complaint proven, but made the further finding, "that the appraisalment therein mentioned was made without notice to the defendant," and entered judgment for appellee. To review this judgment is this appeal.

Appellant contends that this appeal presents the same case heard in *Wilson v. Lunt*, *supra*, and that the doctrine of "the law of the case" is applicable to and decisive of this hearing.

Appellee contends:

First—That the proof herein has modified the case presented by the complaint at the former hearing in this court.

Second—That this being a different case from *Wilson v. Lunt*, *supra*, the doctrine of "the law of the case" is not applicable, therefore he is at liberty to urge, and does urge, that an action will not lie in

favor of appellant, the lessor, on the assignment contract between Timerman and appellee Lunt.

Third—That it appears in the present action that no notice of the appraisalment was given to appellee, that the failure to give such notice is fatal to this action, that this question was not ruled on the former appeal.

Fourth—That the evidence does not show a compliance with the terms of the lease as to the appraisalment in this, that it fails to show that the appraisers made a return of their appraisalment and valuation in writing to appellee or to any one else.

1. As said above, this court in the former appeal held the complaint stated a cause of action. We have the same complaint herein. The lower court herein upon sufficient evidence found the allegations of such complaint proven, and further found that notice of the appraisalment had not been given to appellee. The failure to give this notice does not distinguish the present case from the former, because such notice, in the former hearing, was held not to be essential to recovery by appellant. In the former action the complaint did not allege that notice had been given to appellee, in fact the language of paragraph 7 of the complaint, the only part thereof pertinent to the question of notice, excludes the idea that such notice had been given and the court held the complaint stated a cause of action. If it was necessary for plaintiff to prove notice of the appraisalment to appellee it was necessary to allege it. Further, such notice is not required by the lease between appellant and Timerman, nor by the contract of assignment from Timerman to appellee. These instruments determine the rights of the parties. The lease provides that Timerman shall pay the rent for the full term, that the rent for the second period of five years shall be determined by an appraisalment, such appraisalment to

be had by appraisers selected by the lessor and the assign who may hold the lease. No provision appears in the original lease, nor in the assignment to appellee, whereby in case of assignment any rights are reserved on the part of Timerman or on the part of appellee as to notice to them, or either of them, of the appraisalment, nor was any right reserved by either of them to participate in or have control of the appraisalment. Timerman agreed to pay the rent ascertained by the appraisalment and remained liable for it for the portion of the term remaining after assignment of the lease by him. Appellee Lunt without limitation agreed to perform all the obligations of Timerman. This court held in the former action that appellant, the lessor, could sue upon such contract of appellee Lunt.

The Denver Auditorium Company at the time of the defaults in rent involved herein was the assign holding the lease. The lease and contract of appellee provided that not appellee but the assign holding the lease, The Denver Auditorium Company, should receive notice of the appraisalment and participate therein. The last mentioned company received this notice and participated in the appraisalment and has acted thereunder. This satisfied the terms of the lease and the contract of assignment to appellee.

2. The lower court herein found the requirements of the lease as to an appraisalment satisfied except as to the matter of notice. This was a finding that in effect there was a return of the appraisalment prescribed by the lease. This finding was justified by the fact that when counsel for appellant began to offer proofs as to the details of the appraisalment counsel for appellee said: "There is no issue here about an appraisalment having been made of this property by appraisers, one of whom was selected

by Mr. Wilson, one of whom was selected by The Auditorium Company and the third selected by those two. The point that we make is that Judge Lunt was not a party to that appraisalment, had no notice of it, was not bound by it, and further that it was not such an appraisalment as is provided for in the lease because Mr. Reuter, one of the appraisers, was not an impartial and fair minded appraiser and not competent to act." This was a clear waiver of proof as to details of the appraisalment except as to the one point mentioned, the lack of notice to the appellee, and relieved appellant of proving a return of the appraisalment and valuation in writing.

3. We are asked by appellant to enter final judgment. This we decline to do as it might deprive appellee of the opportunity to have this ruling reviewed by the supreme court in the event appellant prevails upon the retrial below.

Judgment reversed.

Reversed.

[No. 2061.]

WAID V. HOBSON.

1. Practice—Trials—Discretion of Court—Reading Pleadings to Jury—Harmless Error.

The details of the trial are largely within the discretion of the court, and it is not an abuse of that discretion to permit a defendant to read the pleadings to the jury where it does not appear that plaintiff was harmed by such reading.

2. Same—Objections.

Where the defendant, in his opening statement, read to the jury the complaint and answer, if the plaintiff objected to the reading, he should have made his objection before the complaint was read. After the complaint was read to the jury, common fairness required the reading of the answer, and an objection to its reading was properly overruled.

3. Practice—Objections.

An objection to the reading of a pleading to the jury without stating a reason for the objection is worthless, and it is not error to overrule it.

4. Contracts—Oral Evidence to Impeach Written Contract.

Evidence of conversations between the contracting parties prior to and pending the execution of a written contract is admissible in evidence, where such evidence has no reference to the contents of the written contract, but its purpose is to impeach it.

5. Evidence—Immaterial—Harmless.

The admission of immaterial evidence is not reversible error if such evidence is harmless.

6. Bonds—Sureties—Guaranties.

An oral guaranty, given by the obligee in a bond to a surety on the bond to induce the surety to sign the bond, is not void.

7. Same—Promise to Answer Debt of Another.

Where plaintiff, who held a bill of sale to certain cattle, transferred the bill of sale in consideration of the conveyance to him of real estate, and took a bond from the grantors to satisfy an incumbrance on the real estate, and in order to induce defendant to sign the bond as a surety, represented to defendant that he was the owner of the cattle and had left them in the possession of the party who executed the bill of sale, and offered to assign the bill of sale to defendant, so that he might protect himself, and gave defendant his oral personal guaranty that the cattle were as he had represented them, and would be turned over when called for, the guaranty was an original contract and not a promise to answer the debt of another, and in an action by plaintiff upon the bond a failure of plaintiff's guaranty was a valid and good defense.

8. Bonds—Sureties—Guaranties—Fraud—Instructions.

In an action upon a bond where the surety defended by alleging that he was induced to sign the bond by the personal guaranty of plaintiff of the existence of certain facts which would protect defendant from liability, and alleging a breach of the guaranty, the court properly refused an instruction on the question of fraudulent representations, although the instruction was a correct statement of the law in cases where relief is sought on that ground.

9. Same—Statu Quo.

In an action against a surety on a bond, the defendant alleged that he was induced to sign the bond as a surety by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale, and which bill of sale he assigned to defendant, and alleged a breach of the guaranty. The evidence showed that the bill of sale had been lost. Held, that an instruction requested by plaintiff that, to enable defendant to

avail himself of the defense of failure of consideration, he must return the bill of sale, was properly refused.

10. Same—Enquiry.

In an action by the obligee against a surety on a bond where defendant alleged that he was induced to sign the bond by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale and which bill of sale he assigned to defendant, it was not incumbent on defendant to make any enquiry as to the truth or falsity of plaintiff's statements, and an instruction requested by plaintiff, that if defendant could have protected himself against the false representations of plaintiff by ordinary care and prudence he could not avail himself of the defense of fraud, was properly refused.

Error to the District Court of Pueblo County.

MR. W. W. DALE and Messrs. CRANSTON, PITKIN & MOORE, for plaintiff in error.

MESSRS. PATRICK & PRIGMORE and Mr. J. H. McCORKLE, for defendant in error.

THOMSON, J.

Suit by the plaintiff in error on a bond executed by Sophy D. Saufley and Robert C. Saufley, as principals, and the defendant in error, as surety. The bond was conditioned for the satisfaction and extinguishment by the principals of an incumbrance upon real estate sold and conveyed by them to the plaintiff, which condition was alleged to have been broken. The only answer in the case was made by the surety. It alleged that the consideration of the conveyance to the plaintiff was the sale by Orin C. Waid, the plaintiff's husband, to the Saufleys, of a herd of cattle in New Mexico, of which he represented himself to be the owner by purchase from one Miguel Salazar, in whose care he had left them, at Las Conchas ranch; that this defendant became surety for the Saufleys at the solicitation of Mr. Waid, who affirmed, as of his own knowledge, the truth of his representations to the Saufleys, and, to induce Hobson

to become such surety, offered to assign the bill of sale from Salazar to him, to enable him to protect himself as surety by taking the cattle into his own possession, and selling a sufficient number to discharge the obligation, delivering the residue to the Saufleys, and gave Hobson his personal guaranty that the cattle were where he had represented them to be, and that they would be turned over to Hobson when called for; that thereupon Hobson affixed his signature to the bond; that thereafter Hobson, by his agent, demanded of Salazar the cattle mentioned in the bill of sale, but failed to receive them or any of them; and that Salazar did not have the cattle, nor any of them, at Las Conchas ranch, or elsewhere. The reply was a general denial. The trial resulted in a verdict and judgment for the defendant. The plaintiff brings the record here by writ of error.

The testimony was conflicting, but there was enough to sustain the verdict; and if no error occurred at the trial, and the case was properly submitted to the jury, the judgment must be affirmed. The plaintiff alleged error in the following particulars: First, the opening and closing were conceded to the defendant. In his opening statement, defendant's counsel read the pleadings to the jury. The plaintiff's objection to the reading of the defendant's answer was overruled. Second, conversations between one A. C. Bartow and Mr. Saufley, and between Orin C. Waid and Mr. Saufley, prior to the execution of the bond, were admitted in evidence against the objection of the plaintiff. Third, the objection of plaintiff to evidence of the oral guaranty given by Mr. Waid to Hobson was disregarded. Fourth, the court refused an instruction which, so far as we can see, was a correct statement of the law in a case where relief is sought on the ground of false and fraudulent representations; it refused an instruction

that to enable the defendant to avail himself of the defense of failure of consideration, he must return the bill of sale. It refused to instruct that the guaranty given by Mr. Waid to Hobson was void in law, and it declined to say that if the defendant could have protected himself against the false representations of Mr. Waid by ordinary care and prudence, he could not avail himself of a defense of fraud.

1. The details of the trial are largely within the discretion of the trial court. It does not appear that the court abused its discretion by permitting the answer to be read, or that the plaintiff was harmed by the reading. Further, the plaintiff acquiesced in the reading of the complaint; and, as that was before the jury, common fairness required the reading of the answer also. Still further, the abstract shows that no reason was given for the objection to the reading of the answer. In a trial, an objection, without a reason, is worthless. To simply say "I object," amounts to nothing.—*Higgins v. Armstrong*, 9 Colo. 38; *Nelson v. Bank*, 8 Colo. App. 531.

We find no error here.

2. Bartow was the agent of Waid to dispose of the bill of sale, and the conversations between him and Saufley, and also that between Mr. Waid and Saufley, took place while the negotiations which resulted in the conveyance to Waid, and the transfer of the bill of sale to Hobson, were pending, and related to the particulars of the transaction. The evidence was not objectionable as tending to vary or contradict the terms of a valid written instrument. It had no reference to the contents of the bond. It struck deeper. The purpose of its introduction was to impeach the bond; and the position of the plaintiff, in relation to the evidence, is untenable.—1 Greenleaf on Evidence, § 284.

But whatever might have been the importance

of the conversations if the Sausfleys had been in court, they were of no special benefit to this defendant. However, if they were immaterial, they were harmless.

3. The oral guaranty of Waid was not void in law. It was the consideration upon which Hobson signed the bond. It was not the Sausfleys, but Waid, who prevailed upon Hobson to become surety. The latter was to derive no advantage from the transaction; and it was not until, by the guaranty of Waid, he believed himself protected against loss, that he affixed his name to the instrument. Plaintiff's counsel seems to think the guaranty was a promise to answer for the debt or default of Salazar. If he has given a reason for his belief, we have failed to understand him. The guaranty was an original contract between Waid and Hobson, whereby, in consideration of Hobson's signature, Waid warranted the existence of conditions which rendered loss to him impossible. If Waid gave the guaranty, believing that it was of no effect, but that Hobson could not escape from his signature, after having, in reliance upon the guaranty, affixed it to the bond, he was the victim of a mistake.

4. The refusal of the court to instruct, as requested, was eminently proper. This defendant relied upon the breach of Waid's guaranty, and not upon any fraudulent practices of which he may have been guilty, and no instruction relating to fraud was necessary. Indeed, as to this defendant, it would have been improper. The evidence showed that the bill of sale had been lost, and therefore could not be returned. It was not incumbent upon Hobson to make inquiry, or use any care or diligence to protect himself against the possible falsity of Waid's statements. He had Waid's positive personal guaranty, and that was enough. As we have seen, that

guaranty was valid, and to give the instruction requested by the plaintiff that it was not, would have been gross error.

The instructions which the court gave accord with the views expressed in this opinion; and as the record is otherwise free from error, the judgment must be affirmed.

Affirmed.

[No. 1990.]

SALOMON, EXECUTOR, V. MARTIN ET AL.

1. Conveyances—Vendors' Liens.

Where one person conveys real estate to another in such manner that the legal title vests in the latter, and the consideration of the sale is not paid or secured, equity allows the grantor a lien upon the land for its payment.

2. Contracts—Conveyances—Vendors' Liens.

A land owner contracted with two other parties to sell certain land at a fixed price to be paid by them to him in installments at fixed times. The two parties were to have control and handling of the land, and were to plat it and expend not to exceed a certain sum in preparing it for sale as an addition to the city. The amount thus expended to be deducted from the proceeds of the first sales, and to be equally borne by the three parties. The owner agreed to execute deeds to purchasers of parcels of the land and to hold the securities arising from such sales until he was paid the agreed price. All proceeds of sale over and above the stipulated price to be equally divided between the three parties. Held, that the contract was not a sale of land by the owner to the two parties such as would give the owner a vendor's lien on the land for the purchase price, and an assignee of the interest of the owner in the contract acquired no such lien.

3. Same.

Where a land owner entered into a contract with two other parties, whereby the two were to plat the land into a city addition and sell the same, the owner to make deeds to the purchasers, and after paying the owner a stipulated price, the remainder of the proceeds of sale to be equally divided amongst the three, there could be no vendor's lien in favor of the owner alone for the unpaid purchase price of any lot or parcel of land sold under the terms of said contract.

Error to the District Court of El Paso County.

MESSRS. WELLS & TAYLOR, for plaintiffs in error.

MR. C. M. CAMPBELL, for judgment creditors.

MR. A. T. GUNNELL, MR. J. C. HELM, MESSRS. COLBURN, DUDLEY & LEWIS, for other defendants in error.

On Rehearing.

THOMSON, J.

Fred Z. Salomon died in November, 1888, the owner of two sections of land in El Paso county. On the 5th day of February, 1889, Adolph Z. Salomon and David H. Moffat, executors of his will, conveyed the entire property, except about thirteen acres theretofore granted to The Chicago, Rock Island & Pacific Railway Company, to Hyman Z. Salomon for an expressed consideration of \$92,000, the receipt of which was acknowledged. The deed purported to be the execution of a power contained in the will. On the 9th day of February, 1889, Hyman Z. Salomon entered into a contract with Frederick L. Martin and Alvan A. McGovney, of which the following is a copy:

"Articles of agreement made this 9th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, between Hyman Z. Salomon, of the city of Denver, county of Arapahoe, and state of Colorado, of the first part, and Frederick L. Martin and Alvan A. McGovney, of the city of Colorado Springs, in the county of El Paso, state of Colorado, of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the sum of one hundred and twenty-two thousand three hundred and fifty-eight dollars (\$122,358) to be fully paid as hereinafter mentioned, has contracted and agreed to sell to the said parties of the second part, all that certain piece or parcel of

land situate in the county of El Paso, state of Colorado, described as follows: All of sections numbered four (4) and nine (9) in township numbered fourteen (14) south of range numbered sixty-six (66) west, except so much of section four (4) as was conveyed to The Chicago, Rock Island & Pacific Railway Company for right of way, being thirteen (13) acres more or less, in all twelve hundred and twenty-three and fifty-eight one-hundredths (1,223 58-100) acres. And the said party of the first part agrees to execute deeds and contracts to the purchaser or purchasers of parcels of the aforesaid tract of land, and shall hold securities hereinafter mentioned, arising from said sales until he has been fully paid the purchase price of said land, and the payments on said land to be as follows: Eleven thousand one hundred and seventy-nine dollars (\$11,179) cash, and eleven thousand one hundred and seventy-nine dollars (\$11,179) to be paid on April 15, 1889, and the further sums of ten thousand dollars (\$10,000) to be paid on July 1, 1889, ten thousand dollars (\$10,000) on January 1, 1890, and on each succeeding July and January the sum of ten thousand dollars (\$10,000) until January 1, 1894, at which time the said sum of one hundred thousand dollars (\$100,000) shall have been paid. And the said parties of the second part, for themselves, their heirs, executors and administrators, do agree to and with the said party of the first part, his heirs and assigns that the said parties of the second part will pay the said several sums as they severally become due with interest thereon; that said parties of the second part are to have the control and handling of said property, and expend a sum not to exceed twenty thousand dollars (\$20,000) in platting said grounds, grading streets, introducing water through pipes and ditches, also to assist in bringing a street railway from the center of the

said city of Colorado Springs, county and state aforesaid, to the said land; all such expense to be deducted from the first sales of said land or parcels thereof; and the said expense shall be divided as follows: The parties of the second part to pay two-thirds and the party of the first part one-third; provided, however, that the proceeds arising from the sales of said land after the payment of the expenses as aforesaid, and the payment of the land at the purchase price of one hundred dollars (\$100) per acre, the surplus then remaining shall be divided as follows: One-third to the party of the first part, and two-thirds to the parties of the second part. And it is further agreed by and between the parties to these presents that if default be made in fulfilling this agreement in that any of the payments therein mentioned should not be paid in six months after by the terms of this contract required to be paid by the parties of the second part, then the said party of the first part, his heirs and assigns, shall be at liberty to consider this contract as forfeited and annulled, and to dispose of said land to any other person in the same manner as if this contract had never been made.

"In witness whereof they have hereunto set their hands and seals the day and year above written.

"Hyman Z. Salomon.

"Frederick L. Martin.

"A. A. McGovney.

"Signed and delivered in presence of E. H. Wilson."

On the 6th day of August, 1889, Moffat resigned, leaving Adolph Z. Salomon the sole executor. Shortly afterwards, Hyman Z. Salomon, at the request of Martin and McGovney, conveyed undivided interests in the north half of section 9 to a number of persons, those interests aggregating thirty-one fortieths of the one-half section. A corporation was then organized,

by Mr. Wilson, one of whom was selected by The Auditorium Company and the third selected by those two. The point that we make is that Judge Lunt was not a party to that appraisalment, had no notice of it, was not bound by it, and further that it was not such an appraisalment as is provided for in the lease because Mr. Reuter, one of the appraisers, was not an impartial and fair minded appraiser and not competent to act." This was a clear waiver of proof as to details of the appraisalment except as to the one point mentioned, the lack of notice to the appellee, and relieved appellant of proving a return of the appraisalment and valuation in writing.

3. We are asked by appellant to enter final judgment. This we decline to do as it might deprive appellee of the opportunity to have this ruling reviewed by the supreme court in the event appellant prevails upon the retrial below.

Judgment reversed.

Reversed.

[No. 2061.]

WAID V. HOBSON.

1. Practice—Trials—Discretion of Court—Reading Pleadings to Jury—Harmless Error.

The details of the trial are largely within the discretion of the court, and it is not an abuse of that discretion to permit a defendant to read the pleadings to the jury where it does not appear that plaintiff was harmed by such reading.

2. Same—Objections.

Where the defendant, in his opening statement, read to the jury the complaint and answer, if the plaintiff objected to the reading, he should have made his objection before the complaint was read. After the complaint was read to the jury, common fairness required the reading of the answer, and an objection to its reading was properly overruled.

3. Practice—Objections.

An objection to the reading of a pleading to the jury without stating a reason for the objection is worthless, and it is not error to overrule it.

4. Contracts—Oral Evidence to Impeach Written Contract.

Evidence of conversations between the contracting parties prior to and pending the execution of a written contract is admissible in evidence, where such evidence has no reference to the contents of the written contract, but its purpose is to impeach it.

5. Evidence—Immaterial—Harmless.

The admission of immaterial evidence is not reversible error if such evidence is harmless.

6. Bonds—Sureties—Guaranties.

An oral guaranty, given by the obligee in a bond to a surety on the bond to induce the surety to sign the bond, is not void.

7. Same—Promise to Answer Debt of Another.

Where plaintiff, who held a bill of sale to certain cattle, transferred the bill of sale in consideration of the conveyance to him of real estate, and took a bond from the grantors to satisfy an incumbrance on the real estate, and in order to induce defendant to sign the bond as a surety, represented to defendant that he was the owner of the cattle and had left them in the possession of the party who executed the bill of sale, and offered to assign the bill of sale to defendant, so that he might protect himself, and gave defendant his oral personal guaranty that the cattle were as he had represented them, and would be turned over when called for, the guaranty was an original contract and not a promise to answer the debt of another, and in an action by plaintiff upon the bond a failure of plaintiff's guaranty was a valid and good defense.

8. Bonds—Sureties—Guaranties—Fraud—Instructions.

In an action upon a bond where the surety defended by alleging that he was induced to sign the bond by the personal guaranty of plaintiff of the existence of certain facts which would protect defendant from liability, and alleging a breach of the guaranty, the court properly refused an instruction on the question of fraudulent representations, although the instruction was a correct statement of the law in cases where relief is sought on that ground.

9. Same—Statu Quo.

In an action against a surety on a bond, the defendant alleged that he was induced to sign the bond as a surety by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale, and which bill of sale he assigned to defendant, and alleged a breach of the guaranty. The evidence showed that the bill of sale had been lost. Held, that an instruction requested by plaintiff that, to enable defendant to

avall himself of the defense of failure of consideration, he must return the bill of sale, was properly refused.

10. Same—Enquiry.

In an action by the obligee against a surety on a bond where defendant alleged that he was induced to sign the bond by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale and which bill of sale he assigned to defendant, it was not incumbent on defendant to make any enquiry as to the truth or falsity of plaintiff's statements, and an instruction requested by plaintiff, that if defendant could have protected himself against the false representations of plaintiff by ordinary care and prudence he could not avail himself of the defense of fraud, was properly refused.

Error to the District Court of Pueblo County.

Mr. W. W. DALE and Messrs. CRANSTON, PITKIN & MOORE, for plaintiff in error.

Messrs. PATRICK & PRIGMORE and Mr. J. H. McCORKLE, for defendant in error.

THOMSON, J.

Suit by the plaintiff in error on a bond executed by Sophy D. Sausfley and Robert C. Sausfley, as principals, and the defendant in error, as surety. The bond was conditioned for the satisfaction and extinguishment by the principals of an incumbrance upon real estate sold and conveyed by them to the plaintiff, which condition was alleged to have been broken. The only answer in the case was made by the surety. It alleged that the consideration of the conveyance to the plaintiff was the sale by Orin C. Waid, the plaintiff's husband, to the Sausfleys, of a herd of cattle in New Mexico, of which he represented himself to be the owner by purchase from one Miguel Salazar, in whose care he had left them, at Las Conchas ranch; that this defendant became surety for the Sausfleys at the solicitation of Mr. Waid, who affirmed, as of his own knowledge, the truth of his representations to the Sausfleys, and, to induce Hobson

to become such surety, offered to assign the bill of sale from Salazar to him, to enable him to protect himself as surety by taking the cattle into his own possession, and selling a sufficient number to discharge the obligation, delivering the residue to the Saufleys, and gave Hobson his personal guaranty that the cattle were where he had represented them to be, and that they would be turned over to Hobson when called for; that thereupon Hobson affixed his signature to the bond; that thereafter Hobson, by his agent, demanded of Salazar the cattle mentioned in the bill of sale, but failed to receive them or any of them; and that Salazar did not have the cattle, nor any of them, at Las Conchas ranch, or elsewhere. The reply was a general denial. The trial resulted in a verdict and judgment for the defendant. The plaintiff brings the record here by writ of error.

The testimony was conflicting, but there was enough to sustain the verdict; and if no error occurred at the trial, and the case was properly submitted to the jury, the judgment must be affirmed. The plaintiff alleged error in the following particulars: First, the opening and closing were conceded to the defendant. In his opening statement, defendant's counsel read the pleadings to the jury. The plaintiff's objection to the reading of the defendant's answer was overruled. Second, conversations between one A. C. Bartow and Mr. Saufley, and between Orin C. Waid and Mr. Saufley, prior to the execution of the bond, were admitted in evidence against the objection of the plaintiff. Third, the objection of plaintiff to evidence of the oral guaranty given by Mr. Waid to Hobson was disregarded. Fourth, the court refused an instruction which, so far as we can see, was a correct statement of the law in a case where relief is sought on the ground of false and fraudulent representations; it refused an instruction

man executed his deed to the plaintiff, the legal title to the whole was in him. No part of it had been sold. It was embraced in the contract with Martin and McGovney, but they had never disturbed it. He had no lien upon it, for he had never sold it, or contracted to sell it; and the title, both legal and equitable, remained constantly in him. But while he was its owner, judgments were recovered against him, and the liens of the judgments attached to the land. His conveyance to the plaintiff was subject to those liens, and until discharged, they will remain an incumbrance upon the title.

The contract with Martin and McGovney provided that upon default by them in any of their payments for six months, the contract might be regarded as annulled, and a right would vest in Hyman to dispose of the land to any other person, as if the contract had never been made. They were in default for more than six months. By his deed to the plaintiff, Hyman elected to annul the contract; he exercised a right which that instrument, in express terms, conferred upon him; and the plaintiff took the title discharged from any burden which the contract might otherwise have imposed.

The transfers and conveyance to the plaintiff did not constitute an assignment of a vendor's lien, for the simple reason that there was none to assign. With the agreement and notes of Martin and McGovney, he took the remedies upon them of his assignor; and with the deed from Hyman, he took the title, subject to the judgment liens, as security which he could enforce in a proper proceeding, for what Hyman owed him. But he took nothing else; and in so far as he seeks the enforcement of a vendor's lien, his suit must fail.

The question whether, notwithstanding a vendor's lien was not established, the plaintiff was en-

titled to a personal judgment upon the notes, has been withdrawn from the case. In the oral argument upon the rehearing, counsel for the plaintiff expressly disclaimed all right to such judgment apart from the lien, and conceded that if there was no lien, there could be no judgment. In our opinion there was no lien, and the judgment below must be affirmed.

Affirmed

[No. 2065.]

THE CITY OF BOULDER V. WEGER.

1. Cities and Towns—Negligence—Defective Sidewalks—Notice.

In an action against a city for personal injuries caused by falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.

2. Same—Evidence.

In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in defective condition does not establish the particular defect in question, nor charge defendant with notice of such particular defect.

Appeal from the District Court of Boulder County.

Mr. CHARLES M. CAMPBELL, for appellant.

Mr. HENRY J. HERSEY, for appellee.

GUNTER, J.

Appellee had judgment against appellant for damages on account of injuries sustained by a fall on a defective cross-walk in the city of Boulder. The defect was a board about 8 inches wide missing from the wooden cross-walk. To justify affirming this judgment the evidence must show that "the city had knowledge either actual or constructive of the existence of the defect and had not exercised proper

diligence in its repair.”—*City of Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986.

It must appear that “defendant had notice of such obstruction or that it had existed such a length of time as to impart notice, and that the defendant had not used reasonable diligence in removing such obstruction.”—*City of Boulder v. Niles*, 9 Colo. 415; 12 Pac. 632.

In showing actual or constructive notice of the defect to appellant city the evidence fails.

Seven witnesses were for appellee including himself; he testified that he never saw the board missing before the accident. Dr. Shute stated that he never saw the hole in the walk, made by the missing board, prior to the accident. Berkeley said that he never saw the defect complained of, that the cross-walk had been for some years in good condition except that at the date of the trial it contained one board with the end cut off. The only testimony of Lacer in reference to the defect was that appellee showed him the place of the accident the spring following its happening. Ching testified that the morning following the accident he saw the hole for the first time and says: “At the time I saw this there was one plank out of the walk and a hole there, the other planks in the walk were in good condition I should judge, they may have been rotten a little but they were in good condition.” Shaw inspected the spot Saturday after the accident on Monday; he does not testify as to the existence of the hole before the accident. In the course of his testimony he says that the boards on each side of the hole were in sound condition and that the cross-walk was in good condition with the exception of the board in question. Ricketts, the mayor of Boulder, testified but said nothing charging appellant with notice of this defect; his inaugural address to the city council, in-

troduced by appellee, contains nothing pertinent to the question of notice of the defective condition of this particular cross-walk.

No one of appellee's witnesses stated any fact showing that appellant had actual notice of the defect in the cross-walk, no one of them stated that the hole had been in the walk for any length of time whatever before the accident, no one of them testified that the cross-walk had been unsafe in any respect for any time before the accident.

This essential element of notice was not supplied by the evidence introduced in behalf of appellant. It appears from the evidence that this cross-walk was in good condition except at the point of the accident and there the defect consisted in the missing board. Appellant aptly says in its brief: "The plaintiff's witnesses have proved that the alleged injury occurred on the cross-walk March 22, 1897, that the entire cross-walk, a distance of 80 feet, was sound and good except one board gone from the walk about six feet from the west end of the cross-walk, that none of them knew that the board was gone until after the accident. All the witnesses, including the plaintiff himself, swear that they had no knowledge of the existence of the hole before the accident, and none of them say that defendant city had any knowledge or notice of the existence of the hole before the accident occurred."

There was evidence going to show that the wooden walks generally in the city of Boulder were in defective condition, but this did not establish that the cross-walk in question was defective in the particular above mentioned or in any other respect. Nor did evidence that the wooden side-walks in the city were generally in bad condition, and had been for

some time, charge appellant with notice of the particular defect here involved.

Judgment reversed.

Reversed.

[No. 2043.]

THE CITY OF DENVER V. COCHRAN.

1. Negligence—Cities and Towns—Dangerous Walks—Drains.

Where a city keeps open for public travel a much frequented cross-walk, it is its duty to use ordinary care to keep the walk in a reasonably safe condition for travel, although it may be necessary to construct drains to remove surface water. And a city is liable for an injury to a person who, without fault of his own, fell upon a cross-walk made dangerous by the accumulation and freezing of surface water and snow, where the city had notice of such dangerous condition.

2. Same—Evidence—Letters—Notice.

In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty, concerning the walk, was admissible in evidence after his death, to show that the city had notice of the dangerous condition of the walk.

3. Same—Objections.

Where part of a letter is admissible in evidence to show notice to a city of the dangerous condition of a cross-walk, the admission of the entire letter over an objection that it is "immaterial and incompetent" is not erroneous, although part of the letter should not have been read to the jury if such part had been specifically objected to.

Error to the District Court of Arapahoe County.

Mr. J. M. ELLIS, Mr. N. B. BACHTELL and Mr. DAVID G. TAYLOR, for plaintiff in error.

Mr. GEORGE F. DUNKLEE, for defendant in error.

GUNTER, J.

Defendant in error traveling a cross-walk at the intersection of Larimer and Twenty-second streets, Denver, fell, thereby sustaining bodily injuries, to

recover damages for which was this action. Surface water and snow, here collected, had frozen together in a rough and uneven condition, and had so remained for some weeks prior to the accident. The walk was thereby dangerous for travel. Such condition caused the fall. Judgment below was for defendant in error.

Plaintiff in error argued orally two assigned errors:

1. That it appeared from the evidence the dangerous condition of the cross-walk could have been remedied only by the construction of a sewer to convey away the accumulated water; that it was within the discretion of the city whether it should construct such sewer; that therefore its failure to have the walk in a reasonably safe condition by such means was not actionable. In other words the contention was that the city could keep open for public travel this much frequented walk and yet not be obliged to use reasonable care to maintain it in a reasonably safe condition for travel, provided the exercise of such care required the drainage of accumulated surface water. It was the imperative duty of the city to use ordinary care to have this crossing in a reasonably safe condition for travel.—*City of Denver v. Dunsmore*, 7 Colo. 339, 3 Pac. 705; *City of Boulder v. Niles*, 9 Colo. 415; *City of Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986.

The evidence showed the cross-walk, open for travel in a business center, in a dangerous condition, that the city had actual and constructive notice thereof in ample time to have remedied such condition, that defendant in error was injured thereby without fault on his part.

There was also evidence sustaining the verdict of the jury that by the exercise of reasonable care the city could have relieved this condition. This find-

ing brought the case within the law requiring the city to maintain the crossing in a reasonably safe condition. If in obeying this imperative requirement of the law it was necessary to have a drain for the surface water, then the duty was upon the city to provide it, if it left the street open and invited travel upon it. This was not because of the law defining its duty with reference to the drainage of surface water, but because of its obligation, if it kept this street open for travel, to use ordinary care to maintain it in a reasonably safe condition for use.

In *Conroy et al. v. Village of Marseilles et al.*, 136 Ill. 401, it was urged that the village was not liable for damages on account of personal injuries sustained through a defective bridge because it had no funds wherewith to repair the bridge. The court held as the village kept the bridge open for travel it was its duty to repair it, and "It could not be heard in a suit for damages resulting from its want of discharge of duty to say that it had no funds with which to repair."

2. That error was committed in receiving the Himber letter of February 12, 1898. Himber was chief inspector of the board of public works. His duty was to inspect such points as the scene of this accident and report on the same with view to their repair. Evidence other than this letter shows that Himber had inspected this point some time prior to the accident and had made some effort to relieve its condition. Discussions arose between Himber and other city officials as to the care of this walk. The letter was concerning the walk, written in the line of Himber's duties, and was one of the records of his office. At the time of the trial he was dead. The letter by its recitals disclosed that he in his official capacity had notice of the condition of the walk prior to the accident. In *Nicholls v. Webb*, 8 Wheat. 437,

the court admitting entries in his book, made by a deceased notary, giving the facts of demand and notice of nonpayment of a promissory note, said: "We think it a safe principle, that memorandums made by a person in the ordinary course of his business of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done."

In *Augusta v. Windsor*, 19 Me. 317, the entries of a deceased physician made in his account book were admissible to show the date of a fracture of a limb, which date was material in a controversy to which the physician was not a party. See also 9 Am. and Eng. Encl. Law, 2 ed., 938.

The letter was properly admitted for the purpose of showing notice on the part of the city of the condition of the walk. Further its admission could have worked no prejudice to plaintiff in error as to the question of notice because there was other convincing and uncontradicted evidence charging the city with notice of the condition of the walk. The letter contained certain recitals expressing the opinion of the writer as to how the defective condition could be repaired. If this part be conceded inadmissible, the city is in no condition to complain as to its reception. To the letter when offered the only objection was "immaterial and incompetent." The letter was not obnoxious to this objection, it was competent and material for certain purposes. If it was desired to exclude an objectionable part of the letter the objection ought to have gone to this point, the court could then have ruled advisedly on the question of the suppression of the objectionable part.

Other errors assigned go largely to the instructions; they have been considered in the main in the foregoing opinion. When construed together the in-

structions clearly and correctly charge the duty of the city to have been to use ordinary care to make the walk involved reasonably safe for travel. No error assigned justifies a reversal.

Judgment affirmed.

Affirmed

[No. 2056.]

JONES, CONSERVATOR OF ESTATE OF LEARNED, V.
LEARNED.

1. Lunatics—Conservators—Judgments—Notice.

A judgment adjudging a person a lunatic and appointing a conservator of his estate, rendered without notice to the lunatic, is a nullity.

2. Lunatics—Conservators—Judgments—Juries.

A judgment declaring a person a lunatic and appointing a conservator of his estate, without the verdict of a jury finding such person so insane or distracted as to render him incapable or unfit to care for or manage his estate, is without authority and void.

Error to the District Court of Arapahoe County.

Mr. H. P. BENNET, Jr., for plaintiff in error.

Mr. R. H. GILMORE, for defendant in error.

GUNTER, J.

May, 1883, James H. Learned was adjudged insane by the county court of said county and a conservator appointed of his person and estate. February, 1886, the same court held him sane, discharging the conservator. Shortly thereafter he removed to New York state, taking up residence there. By a court of that state he was adjudged insane June, 1886, one Snow being appointed as committee of his person and estate; Snow continued to act as such until November, 1894, when his committeeship was concluded and he discharged. The lunatic escaped from the New York asylum to Connecticut during

Snow's committee ship and has ever since been confined in an asylum in the latter state. February, 1897, by a Connecticut court one Chapin was appointed as, and still is, conservator of the person and estate of the lunatic. January, 1893, Mary A. Learned, wife of the lunatic, without notice to him and without a jury having found him insane, was appointed as his conservatrix by said Arapahoe county court. May, 1893, Mrs. Learned resigned her conservatrixship and plaintiff in error, Jones, was appointed as her successor by last mentioned court without notice to the lunatic and without notice to his then conservator Snow, and without the verdict of a jury declaring him insane. July, 1893, Mrs. Learned died, leaving this lunatic as her sole heir. May, 1897, the lunatic by his next friend, Charles H. Learned, his only brother, filed in the said Arapahoe county court his petition asking that the orders appointing Mrs. Learned and Jones as conservators be declared null and void, and that said Chapin be recognized as conservator. This petition denied by the county court was granted on appeal to the district court February, 1889, and a decree there entered holding the appointments of Mrs. Learned and Jones null and void and remanding the cause to the county court for further action. From this order is this proceeding in error by Jones.

1. This is a direct proceeding to vacate the appointments of Mrs. Learned and Jones. From the above statement it appears that Mrs. Learned was appointed conservatrix without notice to the lunatic and without the verdict of a jury finding him insane. On the resignation of Mrs. Learned, Jones was appointed conservator without notice to the lunatic. The effect of such orders was to deprive him of his liberty and of the possession and control of his property. Such result was without giving him an op-

portunity to be heard. The proceedings thus questioned were taken during 1893, and prior to June 1 thereof, and were under 2 Mills' Ann. Stats., sec. 2935. This section did not in terms require notice to be served upon the lunatic; the authorities, however, are as one that such notice is necessary irrespective of statute. The above section, also most of the act in regard to lunatics, was taken from Illinois; it was construed before borrowed in *Eddy v. The People*, 15 Ill. 386. Therein the party was adjudged a lunatic without notice, the statute at such time did not in terms require notice; the decree was vacated because of the absence of this notice, the court in ruling said: "We are clearly of the opinion that upon the general principles of law, the supposed lunatic is entitled to reasonable notice * * * every principle of justice and right requires that he should have notice and be allowed to manifest his sanity * * *. The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of a community, by any party who might be interested to shut him up in a mad-house, by which he might be divested of his property and his liberty, without an opportunity of a struggle on his part * * * .

To the same effect are *Chase v. Hathaway*, 14 Mass. 222; *Evans v. Johnson*, 39 W. V. 299, 19 S. E. 623; *Holman v. Holman*, 80 Me. 139; *McCurry v. Hooper*, 12 Ala. 823; *Allis v. Morton and another*, 4 Mass. 63.

2. The absence of a verdict of insanity was also fatal to the judgments. Our statute requires the finding of a jury that the person claimed to be disordered is so "insane or distracted as to render him or her incapable or unfit to care for or manage his or her estate." An inquisition of lunacy is regulated

by statute; the statute prescribes the verdict of insanity as a condition precedent to the court exercising the power to adjudge insanity and appoint a conservator. The authorities are agreed that the statute regulating inquisitions of lunacy must be strictly observed and that a failure to observe the requirement of a verdict of insanity is fatal to the proceeding. That the provisions of the statute must be strictly pursued, see *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Partello v. Holton*, 44 N. W. 619, 75 Mich. 372; *North v. Washtenaw*, 26 N. W. 810.

That the absence of a verdict of insanity is fatal to the inquisition, *Eslava v. Lepreter*, 21 Ala. 504; 56 Am. Dec. 266; *Hamilton v. Traber*, 78 Md. 34, 27 Atl. 229.

Wood v. Throckmorton, 26 Colo. 248, 57 Pac. 699, cited as contra to the conclusions here reached does not rule the question before us, the court there declined permission to a lunatic, by a next friend, to question the appointment of a conservator, saying, that as it affirmatively appeared that it was to the best interest of the lunatic to retain the then conservator and as it was within the court's discretion to refuse to permit the appointment to be questioned it would decline to do so and for this reason alone dismissed the writ of error.

It did not appear in the present case that it was to the interest of the lunatic to retain Jones.

Judgment affirmed.

Affirmed.

[No. 2041.]

JONES ET AL. v. THE STOCKGROWERS NATIONAL BANK.

Judgments—Executions—Limitation—Statutory Construction.

The act of 1891 (Session laws 1891, page 246), amending section 1835, General Statutes, and providing that from and after ten years from the entry of final judgment in any court of this

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state it shall be considered as satisfied in full unless revived as provided by law, is prospective only, and does not apply to judgments rendered prior to the passage of the act. Execution may issue on judgments rendered prior to the adoption of said act at any time within twenty years from the entry of such judgments.

Error to the District Court of Pueblo County.

Mr. G. M. DAMERON and Mr. JOHN A. GORDON,
for plaintiffs in error.

Mr. CHAS. E. GAST and Mr. J. H. MCCORKLE,
for defendant in error.

WILSON, P. J.

This was an agreed case, prepared and submitted to the district court under the provisions of code section 278. The statement of facts upon which the controversy depends is brief, and we insert it entire.

"1. The Stockgrowers National Bank of Pueblo, on the 12th day of May, 1888, obtained a judgment in the district court of Pueblo county, Colorado, against G. M. Dameron and James C. Jones for the principal sum of \$2,985.82, and costs of suit, which judgment remained thereafter in full force and effect and unreversed.

"2. On the 21st day of May, 1888, an execution issued thereon, which was satisfied in part by the sale of certain property belonging to the defendant, James C. Jones, on the 10th day of August, 1888, and thereafter there remained of said judgment, unsatisfied, the principal sum of \$1,773.82, but no steps were thereafter taken to revive the said judgment.

"3. On March 9, 1899, the Stockgrowers National Bank aforesaid, sued out from the clerk's office an alias execution for the purpose of collecting the amount of said judgment so remaining unsatisfied, and the said alias writs were placed in the hands of the sheriffs of Bent and Otero counties to execute, and

by the said sheriffs were levied on certain real and personal property situate in the counties aforesaid and belonging to the said James C. Jones.

"The question is, whether the alias writs of execution lawfully issued, and whether the judgment aforesaid remains as a basis for the said alias writs of execution, and could the same lawfully issue without a revivor of the said judgment."

The court found that the alias writs of execution could lawfully issue, and judgment was rendered in favor of the defendant bank. From this plaintiffs appeal.

It is conceded that at the time of the rendition of the judgment under consideration, the limitation on its life was twenty years, and that execution might issue at any time within such period. In 1891, however, the legislature amended section 1835 of the general statutes, being the first section of the chapter entitled "Judgments and Executions," by re-enacting it in its entirety, with the amendments proposed.—Laws 1891, p. 246. The latter part of this amendatory statute reads as follows:

"And, provided, further, That execution may issue on such judgment to enforce the same at any time within twenty years from the entry thereof, but not afterwards, unless revived as provided by law; and from and after ten years from the entry of any final judgment, in any court of this state, the same shall be considered as satisfied in full, unless revived as provided by law. The term real estate, in this section, shall be construed to include all interest of the defendant, or any person to his use held or claimed by virtue of any deed, bond, covenant or otherwise for a conveyance or as mortgagor of lands, in fee for life or for years."

With the exception of the last five lines in this proviso, it will be seen that the matter is entirely new,

there not having been provided in the old section of which this was amendatory, any limit of time within which execution could issue, nor any time after which the judgment should be deemed satisfied. It will also be seen at a glance that there is apparently an irreconcilable conflict in the terms of the proviso. At first it is specified that at any time within twenty years from the entry of the judgment, an execution may issue to enforce it; and immediately following, it is provided that unless revived as provided by law, the judgment shall be considered satisfied in full from and after ten years from the time of the entry. Plaintiffs base their contention upon the ten-year clause in this proviso, holding that more than ten years having passed from the entry of the judgment and prior to the issuance of the alias executions in controversy, the judgment must be deemed fully satisfied and discharged, and the executions must consequently be without any force or effect, having been issued to enforce a dead judgment. This presents the only issue in the case. The sole question to be determined is, Does this statute of 1891 apply to the judgment in question which was rendered prior to its passage? If so, what is the construction of this proviso which we have quoted, so far as it applies to the judgment and executions in controversy? Does the twenty-year clause or the ten-year clause apply?

If the ten-year clause be sustained, and be held applicable to judgments rendered prior to the passage of the act, that the statute would in such case and to such extent be retroactive is self-evident. This alone, however, would not defeat it, because retroactive legislation within certain limits may be sustained when it is remedial in its character—affecting the remedy only. Whether the purpose of the statute under consideration is remedial in its character, we do not deem it necessary to decide. The rule of statutory con-

struction, with or without constitutional inhibition and whether the statute is remedial or otherwise, is that it must be interpreted as prospective unless the contrary intent is clearly manifested. The first and chief aim and object of a court in construing a statute is to ascertain the intention of the legislature, and in every country where the supremacy of law is recognized, it is far more reasonable to suppose that this intention was to legislate for the future rather than the past. Every reasonable doubt as to such intent must be resolved against, rather than in favor of, the retroactive operation of the statute. The leading case upon this subject in this jurisdiction is *Railway Co. v. Woodward*, 4 Colo. 162. In this, Chief Justice Thatcher said: "But when legislatures, even in the absence of a constitutional interdict, pass laws which might be so construed as to give them a retrospective effect, courts will not so interpret them unless the intention of the law-making power is clearly declared. With caution and distrust courts give retrospective statutes effect, even where the law-giver has constitutional power to enact them." To the same effect is *Day v. Madden*, 9 Colo. App. 464, in which Judge Bissell discussed the subject and affirmed the same rule in an able and exhaustive opinion. In *United States v. Heth*, 3 Cranch 399, it was said, in the opinion of the court: "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." The rule is founded on the soundest principles of public policy, and its reason is manifest. Every citizen is supposed to know the law, and to govern his conduct, both as to business affairs and otherwise, in accordance with its provisions. It would be a manifest injustice if after rights had become vested according to exist-

ing laws, they could be taken away, in whole or in part, by subsequent legislation. And even in cases where the legislature is empowered to enact laws to some extent retroactive in effect, it would be equally unjust by judicial construction of a doubtful statute, to take away pre-existing rights, even so far as the remedy only was concerned. Such a course would tend inevitably to bring about a state of uncertainty and instability, which would not only bring the law into disrepute, but work serious injury in many cases.

In this case if the legislature had intended that the new matter in the amendatory statute should apply to or affect pre-existing judgments, it would have been most easy to have indicated such an intent. There is, however, not the slightest word in the phraseology used, even by the most forced construction, to indicate, in our opinion, such an intent. It is true that there was no saving clause to the statute, but the prohibition of retrospective legislation in the constitution and the established rule of statutory construction which we have mentioned, operate as a saving clause. In our opinion on the contrary, the phraseology of the statute indicates an intention that it should be prospective only. The judgments to which it was intended that the act should apply are mentioned in the first five lines of the section, which read as follows: "All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained, in any court of record, either at law or in equity, etc." The word "shall" in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future. Webster, in his dictionary, says, in reference to the early use of the word in the English language: "In the early English, and hence in our English Bible, shall is an auxiliary mainly used in all persons to express

simple futurity." Here there were no qualifying words, although it would have been easy for the legislature, if it had intended that the act should affect pre-existing judgments, to have clearly manifested such intent by the simple insertion of the words "or have been" after the words "shall be" in the extract which we have just quoted.

There being nothing in the act to indicate an intention that it should be otherwise than prospective in its effect, we must hold that the proviso, whatever its construction, did not apply to the judgment in this cause, and that hence the alias executions were lawfully issued. By thus holding, the statute is in no wise nullified, but full effect given to it, so far as concerns judgments subsequently rendered. These views are decisive of the case, and it is not necessary to consider the other questions. We are spared the necessity of what would appear to be the rather onerous task of reconciling the conflict in the statute, and of giving it any reasonable construction.

The judgment will be affirmed. *Affirmed.*

GUNTER, J., having been of counsel, did not participate in the decision of this cause.

[No. 2068.]

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THE BOARD OF COUNTY COMMISSIONERS OF LA PLATA
COUNTY V. DURNELL.

1. Burden of Proof—Accord and Satisfaction.

To sustain a plea of accord and satisfaction the burden of proof is upon the party relying upon such plea to show, by competent evidence, every element necessary to constitute it.

2. Claims Against County—County Warrants—Accord and Satisfaction.

Plaintiff, a county school superintendent, presented to defendant, the board of county commissioners, several itemized bills for services made out on blank forms used for that purpose, on which were printed a blank form indorsement, "the

amount of \$. was allowed on the within account in full payment thereof, by order of the board of county commissioners," with blanks for dates and signature of chairman. It was the custom of the board, when an account was allowed, to fill out the blanks and the chairman signed the indorsement. Some of plaintiff's accounts were allowed in full, some in part and some wholly disallowed. Warrants were issued and accepted by plaintiff, but there were no indorsements on the warrants of any conditions upon which they were issued. There was no proof that plaintiff had any knowledge, either actual or implied, that the amounts allowed in part payment of certain bills were to be taken in full satisfaction thereof, nor that he had any knowledge of the custom of the board to make such conditions in the allowance of bills. Held, that the acceptance of the warrants by plaintiff was not a satisfaction of the claims allowed only in part, and that plaintiff could maintain an action for the balance.

Appeal from the District Court of La Plata County.

Mr. N. C. MILLER, for appellant.

Mr. W. A. REESE and Mr. REESE McCLOSKEY, for appellee.

WILSON, P. J.

Plaintiff presented to defendant, the board of county commissioners of La Plata county, for allowance, a number of separate itemized bills or accounts for services claimed to have been rendered by him as county superintendent of schools. The bills were made out on printed blanks used for the purpose, and on the back of each was the following printed form: "The amount of \$. was allowed on the within account in full payment thereof, by order of the board of county commissioners on the day of , 189.

Chairman."

When the bills were acted upon by the board it seems to have been the custom to fill out the proper blank space with the amount allowed, together with the date, and this was signed by the chairman of the

board. Some of plaintiff's accounts were allowed in full, some only in part and some wholly disallowed. County warrants or orders for the amounts allowed were made out by the county clerk, and were received by the plaintiff, or by his assignee. Plaintiff then commenced this suit for the balance due on the accounts which had been only partially allowed and paid. The defense relied upon is that the warrants for the respective amounts were taken and accepted by plaintiff in full satisfaction of the respective claims. Judgment was for plaintiff.

The facts of this case are quite similar to those of *Rio Grande County v. Hobkirk*, 13 Colo. App. 180, and they are not at all such as to bring the case within the rule announced in *Board of Commissioners of La Plata County v. Morgan*, 28 Colo. 322, 65 Pac. 41. The defendant's plea was in the nature of accord and satisfaction, and to sustain it the burden was upon it to show by competent evidence every element necessary to constitute it.—*Rio Grande County v. Hobkirk*, *supra*. In this it wholly failed. There was no proof that the plaintiff had any knowledge that the board in the allowance of only a part of his claims at the time when presented, had prescribed or intended to prescribe as a condition that such allowance was to be taken in full satisfaction of the claim. Nor were any facts or circumstances shown which were equivalent to, or from which such knowledge on plaintiff's part could be implied. Nor was it shown that plaintiff had any knowledge of the custom of the board, if such a custom existed, of prescribing as a condition when it disallowed a claim in part that the allowance should be accepted in full payment. This knowledge was shown in the *Morgan* case, and was precisely that upon which the court based its opinion. It said: "It sufficiently appears from the record that defendant in error was cognizant of the mode of doing business by,

and the universal custom of, the board, when it disallowed a portion of a claim to prescribe, as a condition of the right of the claimant to receive a warrant for the part allowed that he should take it in full satisfaction of the entire claim. When he took his warrants plaintiff had knowledge, or facts equivalent to knowledge, not only of this condition, but also that endorsements to this effect were made upon the back of the blank form." It was not shown in this case that plaintiff ever saw the voucher or claim presented after it had been acted upon by the board, and after this blank form on the back of the claim had been filled out. Even if he had seen it, under the evidence in this case, it possibly would not alone have been sufficient to have estopped him from bringing this suit, because it appeared that in a number of instances of which plaintiff had knowledge, they being with reference to his own claims, the board had allowed only a part of his claim, and had subsequently allowed the remainder, showing that the board itself did not regard this endorsement upon the back of a claim as conclusive and final. It is in evidence that the plaintiff saw only the warrants which were issued in payment of the sums allowed, and there were no endorsements whatever upon these to show any conditions upon which they were issued. It seems, too, that at the time of the acceptance of these warrants, the plaintiff, although it is shown that he had no knowledge of any condition being attached to their issuance, expressly notified the clerk that he did not accept them in full of his claims.

The judgment of the court was correct, and it will be affirmed.

Affirmed.

[No. 2039.]

CRIPPEN, TRUSTEE, V. COMSTOCK ET AL.

1. Water Rights—Conveyances.

A water right, even though it may be appurtenant to land, is the subject of property, and may be conveyed with or without the land.

2. Same—Mortgages—After Acquired Water Rights.

A deed of trust conveying land together with all ditches and water rights thereunto belonging without any specific mention or description of the ditch or water right, does not convey an after acquired water right and ditch not in existence at the time the trust deed was executed.

3. Same—Appurtenances.

Plaintiff took a deed of trust conveying certain land, together with all ditches and water rights thereunto belonging. Afterwards the grantor constructed a ditch and used the water therefrom at all times in irrigation of the land conveyed by deed of trust to plaintiff. About the time the ditch was completed the grantor executed to defendant a deed of trust to land adjoining that conveyed to plaintiff and in the deed of trust conveyed the ditch by particular description, and the water right thereby acquired. Defendant had no notice of any intention on the part of the grantor to appropriate and use the water so as to become an appurtenant to the land conveyed by the first deed of trust. Held, that the ditch and water right did not become an appurtenant to the land on which the water was used so as to vest in plaintiff, but that the express conveyance thereof to defendant vested in defendant the superior title.

4. Mortgages—Application for Loan—After Acquired Water Right—Notice.

Where a deed of trust conveyed land together with all ditches and water rights thereto belonging without any specific mention of an after acquired water right and subsequently constructed ditch, statements made in an unrecorded application for the loan or to the mortgagee in reference to such ditch and water right could have no force or effect against a subsequent mortgagee to whom the ditch and water right were expressly conveyed by deed of trust where said second mortgagee had no knowledge of such statements.

Error to the District Court of Chaffee County.

Messrs. HODGES, WILSON & HODGES, for plaintiff in error.

Mr. G. K. HARTENSTEIN, for defendants in error.

WILSON, P. J.

This controversy involves the ownership of an undivided one-eighth interest in what is known as the Bowen ditch, taking water from Chalk creek, in Chaffee county, for the purpose of irrigation, and of the right to the water flowing in said ditch, to the extent of one-eighth of the whole. The material facts upon which the issues turn are that on August 8, 1888, George L. Smith made application in writing to Crippen, Lawrence and Company for a loan of one thousand dollars, to secure the payment of which he proposed to execute a deed of trust upon one hundred and sixty acres of land owned by him. In this formal application occurred *inter alia* the following:

"Q. 13. From what canal is the land irrigated?

"A. Private canal out of Brown's creek; also one-eighth interest in large ditch from Chalk creek.

"Q. 16. Will you assign above water rights as security for this loan?

"A. Yes."

The loan was made, and on August 20, following, Smith executed a deed of trust to secure its payment. In the deed of trust, after the usual conveyance clause and a description of the land it was recited: "Together with all ditches and water rights thereunto belonging or in any wise appertaining, to have and to hold the same, together with all and singular the tenements, hereditaments * * * including all water rights and privileges, ditch or ditches * * * or in case of waste, or nonpayment of taxes, water dues or assessments, etc."

The loan was made for a period of five years. On October 12, 1888, Smith and seven others prepared

and filed in the office of the county clerk of Chaffee county, as required by law, a statement of their intention to take out an irrigating ditch, to be known as the Bowen ditch, from Chalk creek, and also a map showing the line of the ditch, capacity, etc. In this verified statement it was recited that work was commenced on the ditch on September 24, 1888. On July 22, 1890, Smith executed a deed of trust upon certain other lands, adjoining, however, those described in the first mentioned deed of trust, to secure the payment of a note given by him to The Colorado Loan and Mortgage Company. In this deed, after the conveying clause and a description of the land to be conveyed, it was recited: "Together with a one-eighth interest in Bowen ditch and all of Brown's creek ditches, including with said land all ditch and water rights thereunto appertaining or in any way belonging, or which are held or controlled by the said party of the first part at this date, or which may be acquired by said first party as to said land during the existence of this trust deed."

A number of other conveyances were offered and received in evidence and are preserved as exhibits in the record, but a consideration of these two only is necessary for the determination of the cause. The plaintiff, who is here plaintiff in error, claims title under and through the first deed of trust, the defendants under the second. The relief prayed was that the defendants be adjudged and decreed to have no right, title or interest in or to any part of the Bowen ditch, or use of any part of the water decreed to or flowing in the same adverse to that of this plaintiff, and that they be forever barred and estopped from making or asserting any claim thereto, adverse or paramount to that of any of the other parties to the action, such other parties being the owners of the other interests in the ditch. The defendants an-

swered, denying the asserted claims of plaintiff in all respects. They also alleged ownership of the ditch interest in themselves, and prayed judgment that they be adjudged to be such owners. The issues were found in favor of the defendants, and judgment rendered accordingly.

The complaint was framed on the theory that Smith, through whom both parties claim, held the ditch interest and water right in controversy as trustee for the grantors of the plaintiff, but present counsel have practically abandoned that theory, and rely for recovery upon the contention that the ditch and water right were appurtenant to the land conveyed in the first deed of trust, and as such were embraced in such deed of trust, and passed to the purchaser and his successors upon foreclosure. This point only we will consider. That the interest in the ditch itself was not conveyed in any manner by the first deed of trust is apparent, because it is not specifically mentioned, and for the additional cogent reason that it was not in existence at that time, the ditch not even having been commenced. The plaintiff or his grantors might, however, have acquired a right to the water flowing in the ditch to the extent of a one-eighth part, without having acquired an interest in the ownership of the ditch itself. The question then is: Did the grantors of plaintiff acquire the water right in the Bowen ditch by the deed of trust? It must be borne in mind that a water right itself, even though it may be appurtenant to land, is the subject of property, and may be conveyed with or without the land. This legal proposition has been positively settled by repeated adjudications in this state. We refer to a few only.—*Strickler v. City of Colorado Springs*, 16 Colo. 61; *Arnett v. Linhart*, 21 Colo. 188; *Daum v. Conley*, 27 Colo. 56, 59 Pac. 753; *Child v. Whitman*, 7 Colo. App. 117.

In the Linhart case, *supra*, the supreme court said: "Being therefore a distinct subject of grant and transferable with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land." That the deed did not convey the water right in dispute *in praesenti* is clear, because it was not in existence at the time. The plaintiff insists, however, that the water right, though after acquired, was made an appurtenant to the land embraced in the deed of trust, under which he claims, by appropriation and actual user, and should be held to inure to his benefit. We do not think that the position of plaintiff in this respect can be sustained under the facts of the case, as presented. It is not necessary to discuss nor determine when, how, or under what circumstances if at all, an after acquired water right might become appurtenant to land by appropriation and user. The facts are lacking in this case to sustain such a contention in any event. Water right being in this state a subject of property, there must, before an after acquired water right could become appurtenant to land, have been manifested to some extent under the rule laid down by the supreme court, an intention that it should become so. It was conceded in this case that the water right acquired by Smith's ownership of a one-eighth interest in the Bowen ditch was used at all times after construction of the ditch for the irrigation of the land described in the first deed of trust; but it is nowhere shown when the ditch was completed, and at what time such user of this water right commenced. There was no testimony whatever upon this point, and the only reference

which we find to it is an incidental allusion in the complaint, in which it is charged that Smith "as such trustee or agent so constructed and said appropriation of water made, which use began during the year 1890, etc." We are nowhere advised as to what time in 1890, and it will be remembered that the second deed of trust was executed in July, 1890, and that therein Smith's interest in the Bowen ditch was specifically mentioned, and was included in the conveyance. Here was the first evidence of Smith's intention as to the disposition of his interest in the ditch. It must be remembered, too, that at this time and for years afterwards, Smith was in possession of the tracts of land described in both deeds of trust. So far as appears from the record, neither the trustee nor the beneficiaries in the second deed of trust had any notice of any intention on the part of Smith, if such were the case, to so appropriate and use this water as to become an appurtenant to the land described in the first deed of trust. There was no testimony offered or received to show or showing that before the execution of the second deed of trust any water at all was taken from the Bowen ditch and used upon the land embraced in the first deed of trust. The statement in his application for loan was of no force whatever, even if it could become such in any event against third parties, because it was not of record, and is not shown to have come to the knowledge of the parties to the second deed of trust. Nor would any statement which Smith made to the parties to the first deed of trust at the time of its execution have been of any force or effect as against the parties to the second deed of trust, unless brought to their knowledge prior to the inception of their interest, which is not shown. The parties to the second deed of trust, therefore, having no notice at the time of the execution of their deed of trust, either actual

or constructive, that Smith's interest in the water flowing through the Bowen ditch was or was intended to be used upon the land, or that it ever became or was intended to be an appurtenant to the land embraced in the first deed of trust, it must be held that the express conveyance to them of the ditch and water right was valid, and the title derived under it superior to that set up by those claiming under the first deed of trust. These conclusions necessitate an affirmation of the judgment.

Clyne v. Water Co., 100 Calif. 310, relied upon by plaintiff, is not at all in point as we view the case. That did not in effect involve an after acquired water right. It concerned only the water right which was in existence at the time of, and was conveyed by the mortgage. While the mortgage was in effect, the mortgagor contracted with a water company which desired to construct a reservoir on the stream above the mortgaged premises to surrender her water right, provided that the company would thereafter deliver to her premises through its pipes the same amount of water which they had before enjoyed. The suit was by the owner of the premises under the foreclosure of the mortgage, who simply sought to compel the water company to comply with its contract. No new water right was created by this contract. It involved simply the delivery of the water to which the premises were entitled by virtue of the water right appurtenant to them at the time the mortgage was executed.

There were other important questions raised and discussed, but as the one which we have considered is decisive of the appeal, we need not refer to them.

Affirmed.

[No. 2055.]

BROCKWAY V. THE W. & T. SMITH CO.

1. Summons—Appearance—Copy of Complaint—Taxing Cost.

Where a defendant procures from the clerk a copy of a complaint and taxes the cost thereof against the plaintiff as authorized by section 45, Mills' Annotated Code, it is a general appearance in the action, and waives all defects of service of summons.

2. Appellate Practice—Final Judgment—Denying Default.

An order quashing service of summons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court.

Error to the District Court of Mesa County.

Mr. JOHN P. BROCKWAY, *pro se*.

THOMSON, J.

The plaintiff in error brought this action against the defendant in error to recover the amount of an alleged indebtedness, and subject land to its payment, on which it was alleged to be a lien. Summons was served on the defendant, Rhone, but not on the defendant, The W. & T. Smith Company. Service upon the latter defendant by publication was then attempted, and, as the plaintiff insists, completed. However, on the Smith Company's motion, for the sole purpose of which its appearance was specially entered, the return of this service was quashed for certain supposed irregularities in the procurement of the order authorizing the publication.

On the 2d day of February, 1898, The Smith company, by its attorney, demanded and obtained, from the clerk of the court, a copy of the complaint in the suit, and caused the cost of the copy, being \$2.10, to be taxed against the plaintiff. On the 7th day of March, 1899—The Smith company having filed no pleading in the cause—the plaintiff moved the court for a default against it, on the ground that by its procurement of a copy of the complaint at the

cost of the plaintiff, it had made a general appearance and the time for pleading had expired. The motion was denied.

The following is from section 45, Mills' Annotated Code:

"The party filing any pleading of fact, or amendment thereto, or any demurrer, petition, or motion in any cause, shall also lodge with the clerk a copy thereof for the adverse party, unless it shall appear that such adverse party, or his attorney, has already received such copy, and in default of so doing the clerk shall, upon request of the adverse party, make such copy, taxing the cost thereof against the party so in default."

An unserved defendant desiring to move in a cause, may limit his appearance to the purpose in hand. But any appearance which is not, in terms, expressed to be special, is general. If the act of the defendant in procuring a copy of the complaint, and causing the cost to be taxed against the plaintiff, was an appearance at all, it was a general appearance. We think it was an appearance. The defendant exercised a right which the code provision we have quoted, gives only to a party. It could take no action in the cause whereby costs might be taxed against the plaintiff, without acknowledging itself a party. If it had not been served with summons, it was a stranger to the case; but it might, nevertheless, appear voluntarily, and so make itself a party; and by doing that which is allowable only to a party, and which could not be done without coming into the case, the defendant waived the service of summons, and subjected itself to the jurisdiction of the court.

But the cause is still pending below. While the court quashed the return of service, and denied the motion for a default, it entered no judgment against the plaintiff. All proceedings in the case stopped

with the denial of the default. With that order, the record before us ends. Our statute permits the review in appellate courts of final judgments only.—Secs. 368, 406, 406d, Mills' Ann. Code.

Let the writ of error be dismissed.

Dismissed.

[No. 1933.]

CARNAHAN V. CONNOLLY.

1. Appellate Practice—Bills of Exception.

Where an action was dismissed under a rule of court for want of prosecution, and the bill of exceptions contains neither the rule nor the facts upon which the court acted in ordering the dismissal, an assignment of error based upon the order of dismissal will not be considered.

2. Practice—Dismissal—Notice—Waiver—Appearance.

Where the court of its own motion called a case as within a rule for dismissal for want of prosecution, and plaintiff's counsel had case set for hearing on question as to whether or not it should be dismissed, and voluntarily appeared at such hearing and without objection went into the trial of the question, he waived objection that no notice was served upon him.

3. Appellate Practice—Judgments—Presumption of Regularity.

On appeal a judgment of a court of general jurisdiction having jurisdiction of the subject-matter and parties, and power to enter the judgment in question, is presumed to be regular in every respect unless the contrary appears from the record.

4. Practice—Adverse Suits—Dismissal.

The dismissal of an adverse suit without a verdict is not obnoxious to section 2326, U. S. Rev. Stats., which provides that, if title is not established in either party, the jury shall so find.

5. Appellate Practice—Bills of Exception—Rules of Court—Motion for New Trial.

Where a case was dismissed under a certain rule of court, the court rule cannot be brought before the appellate court for review by including a copy thereof in a motion for new trial and incorporating the motion in the bill of exceptions. The statement in the motion that it contains a copy of the rule is no evidence of the existence or contents of the rule.

17	98
19	153
19	204

17	98
34a	345

17	98
368	360

6. Appellate Practice—Rules of Trial Court—Dismissal—Presumptions.

A rule of the trial court providing for the dismissal of causes for failure of prosecution is valid and the court has power to enforce it. And where the facts to which the court applied the rule in dismissing a case are not before the appellate court it cannot say that the trial court abused its discretion or violated the law in applying the rule.

7. Appellate Practice—Supplemental Record.

Leave will not be granted to a party to file a supplemental record, after the case has been decided and pending a motion for rehearing to bring before the court a rule of the trial court where the briefs of the adverse party contended that the rule was not before the court and the party making the request had ample warning of the contention that the rule was not in the record and ample opportunity to amend the record before the cause was determined.

Error to the District Court of Lake County.

MR. CHARLES J. HUGHES, Jr., and Mr. JOHN M. MAXWELL, for plaintiff in error.

MESSRS. THOMAS, BRYANT & LEE, for defendant in error.

MR. A. S. BLAKE, of counsel.

GUNTER, J.

March 5, 1895, complaint in adverse suit filed in district court of Lake county, 23d of same month defendant's demurrer. March 7, 1898, cause called by court as within rule for dismissal for want of prosecution. On motion of plaintiff's then counsel question whether case should be dismissed for want of prosecution under rule 18 of said court set for hearing at 2 o'clock p. m. March 8, 1898. Hearing had, plaintiff and defendant appearing by respective counsel, evidence and argument heard. Court found case should be dismissed and entered judgment in which appears: "It is ordered by the court that this case be and the same hereby is dismissed for want of

prosecution under rule 18 of the rules of this court, no good cause having been shown to the court why the same should not be dismissed." To this ruling an exception saved in bill of exceptions. (Folio 73, record.) Motion for reinstatement heard and denied March 14, 1898. Exception to order preserved in bill of exceptions. (Folio 75, record.)

Plaintiff assigns errors in above orders of March 9 and 14.

1. A ruling upon the motion to strike the bill of exceptions is unnecessary, for the purpose hereof it will be considered a part of the record. So assumed, the case for review is:

The district court after full hearing, all parties in interest voluntarily present, dismissed the above cause for lack of prosecution under rule 18 of that court. A motion for reinstatement was thereafter entertained and after full hearing, all parties in interest present, was denied. Rule 18 not being preserved in the bill of exceptions is not before us.—*Illinois Cent. R. R. Co. v. Haskins*, 115 Ill. 300; *Harrigan v. Turner*, 53 Ill. 292; *Anderson v. McCormack*, 129 Ill. 308; *Encyclopedia Pleadings and Practice*, vol. 3, 387.

The facts upon which the court acted in ordering the dismissal are not before us, not being preserved by bill of exceptions; so with the facts upon which it acted in denying the reinstatement.

A ruling upon the question whether written notice to plaintiff was required by the code of the court's action in calling this case upon its own motion under the rule is not necessary, because if such notice was necessary it was waived by counsel for plaintiff voluntarily having the matter set when called, and appearing without objection on the day so set, and going into the trial of the question whether the case should be dismissed for lack of prosecution under the

rule. Taking such matter up without notice, if error, was but an irregularity which could be waived.—*Greig v. Clement et al.*, 20 Colo. 167, 37 Pac. 960; *Archibald et al. v. State of Tenn.*, 8 Heiskell, 871; *Rich v. Starbuck*, 45 Ind. 310.

The case is reduced to this: A judgment of a court of general jurisdiction, having jurisdiction of the subject-matter, of the parties and power to enter the judgment in question, is assailed for error; where in the error consists we are not informed by the record. This judgment is presumed to have been regular in every respect unless the contrary appears in the record.—*Andrews v. Carlile*, 20 Colo. 372, 38 Pac. 465; *Martin v. Force*, 3 Colo. 199.

2. The contention that the dismissal of this case without a verdict is obnoxious to section 2326, Revised Statutes of the United States, has been denied by our supreme court in *Kirk et al. v. Meldrum et al.*, 28 Colo. 453, 65 Pac. 633.

As the judgment below is presumed to have been regular in every respect, and as this presumption has not been overcome by the record it will be affirmed.

Affirmed.

On Petition for Rehearing.

GUNTER, J.

Since the filing of the petition for a rehearing the original record, its abstract and the elaborate briefs herein have been with care re-examined. After such reconsideration we see no reason to change the conclusions reached in the former opinion.

If it be conceded that the motion for a reinstatement of the case, heard and denied by the trial court, March 14, is a motion for a new trial as contemplated by the code section 387, and perforce this section is in the record, without its inclusion in the bill of excep-

tions, which we do not hold, yet this does not bring rule 18 before us, or affect our former ruling.

The motion states, as one of the grounds for the reinstatement asked, that rule 18 under which the order of dismissal was made, is in violation of our civil code and the revised statutes of the United States, and recites therein what the mover claims to be a copy of the rule. The mere recital in a motion for a new trial of a fact as the ground of the motion is no evidence of the existence of the fact. The statement in this motion that it contains a copy of rule 18 is no evidence of the existence or contents of the rule. Suppose a motion for a new trial recited newly discovered evidence as a ground therefor, and stated what it claimed were facts showing such ground, would the mere inclusion of this motion in the record by section 387, *supra*, be any evidence of the existence of such facts? We think not, and the courts have so ruled.

“There is no bill of exceptions showing that the court was requested to instruct in writing, and we cannot examine the question whether the instructions are or are not in writing. Recitals in a motion for a new trial cannot perform the office of a statement required to be incorporated in a bill of exceptions, nor can the recital of the clerk take the place of such a statement.”—*Clouser v. Ruckman, Adm’r.*, 104 Ind. 588.

“It is well settled that unless objections to evidence are stated in the bill of exceptions, they cannot be considered on appeal. A party cannot by statements made in his motion for a new trial get evidence or objections stated to evidence into the record. The only way in which this can be done is by a bill of exceptions.”—*Thompson et al. v. The Madison Building and Aid Association*, 103 Ind. 279.

“A bill of exceptions was taken to the overruling

of a motion for a new trial. The motion for a new trial is copied into this bill. The motion so copied alleges that certain instructions were given, but the effect of this bill is only that the motion was filed and overruled, and not that the facts alleged in that motion existed."—*Herring v. State of Iowa*, 1 Ia. 205; also *Pharo v. Johnson, Executor*, 15 Ia. 560.

We are justified in holding that there is no evidence before us of the contents of rule 18. Further, the order of March 14, denying the application to reinstate recites that the court in acting "was well advised in the premises." As the facts upon which the court acted are in no manner before us for aught we know by this record the contents of the rule as claimed by plaintiff in error might have been disproved. But if for the purpose of this decision we assume the rule to be as the plaintiff in error contends, and to be before us, yet, no reason exists for a modification of the former opinion.

In *Cone v. Jackson*, 12 Colo. App. 461, 463; 55 Pac. 940, a rule in effect the same as the one under consideration was held legal. There the lower court after hearing evidence dismissed the case as under the rule. Later, plaintiffs appeared and moved to vacate the order of dismissal and to reinstate the cause. This motion on hearing was denied. In affirming the holding this court said:

"Motions of this character are addressed to the sound discretion of the trial court, and unless it manifestly appears that there has been an abuse of discretion, or that it has been arbitrarily exercised, this court cannot interfere. The burden is upon one who seeks the benefit of such a motion to show such abuse or arbitrary exercise of discretion."

The legality of such a rule was reaffirmed in *Hoy et al. v. McConaghy*, 14 Colo. App. 372, 376; 60 Pac. 184. The case, however, was reversed on the

ground that the trial court violated the law in applying the rule. In the opinion it is said: "It appears, therefore, that in this action after the plaintiffs had gotten their cause to issue and done everything that was required of them by law, and without failure or negligence on their part to comply with any rules or order of court, the cause was dismissed."

The rule herein was valid; the court had power to enforce it. We have not the facts to which the court applied the rule when it dismissed the case on March 9, nor have we the facts upon which the court acted in denying the reinstatement of March 14. We cannot say that the court in applying this rule abused its discretion or violated the law. Acting on the principle, "He who alleges error must make it affirmatively appear," we adhere to the original opinion.—*McKenzie v. E. R. Murphy and Mary M. Murphy, Administratrix*, 29 Colo. 485.

Since the handing down of the original opinion plaintiff in error has filed a petition for leave to supplement the record herein by filing a certified copy of the rules of the district court trying this cause containing a copy of rule 18. A sufficient reason for denying this application is, it comes too late. The case was transferred from the supreme court; the record lodged there July 5, 1899; the first brief August 5, 1899. Throughout the numerous briefs defendant in error has contended that the rule was not before us; plaintiff in error has insisted the contrary. There was ample warning of this question, and ample opportunity to amend the record before original ruling.—*Martin v. Force*, 3 Colo. 199; *O'Haire v. Burns et al.*, 25 Colo. 158, 53 Pac. 326; *Joralmon et al. v. McPhee et al.*, 29 Colo. 135, 66 Pac. 882.

Petition for rehearing denied.

[No. 1934.]

CARNAHAN V. CONNOLLY.

Error to the District Court of Lake County.

Mr. CHARLES J. HUGHES, Jr., and Mr. JOHN M. MAXWELL, for plaintiff in error.

Messrs. THOMAS, BRYANT & LEE, for defendant in error.

Mr. A. S. BLAKE, of counsel.

Per Curiam.—The questions involved in this case are the same as those determined in No. 1933, Charles T. Carnahan, plaintiff in error, v. P. K. Connolly, defendant in error, and for reasons given in that case the judgment is affirmed.

Affirmed.

[No. 1935.]

CARNAHAN V. CONNOLLY.

Error to the District Court of Lake County.

Mr. CHARLES J. HUGHES, Jr., and Mr. JOHN M. MAXWELL, for plaintiff in error.

Messrs. THOMAS, BRYANT & LEE, for defendant in error.

Mr. A. S. BLAKE, of counsel.

Per Curiam.—The questions involved in this case are the same as those determined in No. 1933, Charles T. Carnahan, plaintiff in error, v. P. K. Connolly, defendant in error, and for reasons given in that case the judgment is affirmed.

Affirmed.

[No. 2028.]

**SCHAUSTEN V. THE CRIPPLE CREEK GOLD MINES AND
LAND COMPANY.****Principal and Agent—Contracts—Specific Performance.**

Real estate agents authorized to sell certain lots subject to the approval of the owner, negotiated a sale to a purchaser who knew of the limitation upon their power, a payment was made and the agents executed a receipt therefor containing a statement of the terms of sale in duplicate. The owner refused to approve the sale unless a certain condition was inserted, and interlined the condition in its copy and endorsed its approval on the amended copy, and returned it to the agents with instructions to insert the same condition in the copy delivered to the purchaser. The purchaser refused to sign the amended receipt, but continued to deposit money in bank as the installments came due under the original receipt. The owner directed the bank to return the purchase money, which was declined by the purchaser, who offered to pay the balance of the purchase price and demanded a deed. Held, that there was no contract for the sale of the lots that would support an action for specific performance.

Appeal from the District Court of El Paso County.

Messrs. MORRISON & DeSOTO, for appellant.

Messrs. BENEDICT & PHELPS, for appellee.

GUNTER, J.

Appellee owned certain lots in Cripple Creek on which was situate its office building. The firm of Simmons & Sowle was its agent for negotiating a sale of these lots; all sales being subject to the approval of appellee. Appellant knew, through its agent, this limitation on the powers of the agent firm. September 6, 1895, Simmons, of this firm, telephoned Sowle, another member, then in Denver, that he could sell the lots at a certain price. Sowle so informed appellee, who refused to authorize the contract of sale unless it contained this reservation: "Said improvements (the office building) to remain free of rent for a period of eight months from date

hereof unless ground occupied by same is required for immediate permanent improvements, in which event said party of the first part (appellee) is to have sixty days notice to remove building." This was at once communicated to Simmons at Cripple Creek. A letter from Simmons & Sowle, of September 7, followed, advising appellee of the sale of the lots.

September 9 appellee wrote that it could not approve the sale until it had seen a copy of the receipt given the purchaser, referring to the receipt issued September 6 by the above firm to appellant containing the terms of the contract of sale. This had been draughted in duplicate and left, at the time of execution by Simmons & Sowle, in the hands of Mr. Babbitt, attorney for appellant, for transmission to her for execution, she then residing in Denver.

This requested instrument did not reach appellee until October 12; it understood at the time that the delay was due to securing the signature of Mrs. Schausten. On examination of the receipt the reservation hereinabove mentioned was not present. October 15 appellee returned it to Messrs. Simmons & Sowle with an interlineation of the reservation and instructed this firm "To insert the same clause in the other copy of the contract and take it up by delivering this copy and then return the other to us."

Upon the copy thus sent Simmons & Sowle, after so amended, appellee had endorsed its approval. Sowle returned from Denver to Cripple Creek, and within about four days after the date of the original receipt or contract informed Mr. McRobbie, the agent of appellant throughout this transaction, that appellee would not approve the contract in its then form, and that the \$100.00 paid into bank as preliminary upon the contract was subject to his order. Mr. Babbitt, the attorney of Mrs. Schausten in this matter, was also informed about the same time that appellee would

not approve the contract. During the next two and a half months there were several conferences between Sowle and McRobbie whereby appellant knew, through her agent McRobbie, that appellee had not approved, and would not approve, the contract without its containing the above reservation.

October 10 a second payment, according to the terms of the contract of September 6, was made by appellant into bank at Cripple Creek to the credit of appellee. November 16 appellee was advised by letter from Simmons & Sowle that appellant wanted possession of the lots and that appellee would have to move by December 10 its office building. It will be remembered that October 15 appellee had amended the contract issued by Simmons & Sowle by inserting therein the above mentioned reservation, returned it to this firm as so amended with its approval thereon. This amended contract was never executed by appellant. Appellee and appellant had never as yet agreed upon a contract. By its letters of November 18 appellee advised appellant that all negotiations were at an end; ordered the bank in which appellant had made three payments, pending above negotiations, to return the same to her. These she declined, and continued to tender payments according to the terms of the contract until November 10, 1896, when she offered to pay the remainder of the purchase price, and demanded a deed. This was refused, hence this suit for specific performance, and this appeal from a judgment adverse to her.

Trial below was to the court.

From the foregoing statement it appears that when the original contract, the one here sued on, was executed by Simmons & Sowle, and the preliminary payment made, that Simmons & Sowle had no authority to make the alleged contract, and that appellant, through its agent, then knew of such absence of

authority. The extent of the power of this agent firm was to negotiate a sale, and submit it for approval to appellee. Within a few days after the date of the original contract appellant knew that the proposed terms of sale had been rejected by appellee, and that the preliminary payment was subject to her order. With this knowledge she made her second payment, October 10, into bank to credit of appellee. With this knowledge, emphasized by the subsequent demands of Sowle for a surrender of the contract and his remonstrance against appellant placing building material on the lot, the construction of a small frame house on the lot was begun. The negotiations were terminated by appellee's letters of November 18, declaring them at an end and instructing the bank to pay to appellant the \$300.00 there placed to its credit during negotiations.

It is clear that appellee did not, by previous authority, authorize the contract sued on; that it has in no manner ratified the same. Further, no matter in estoppel appears precluding the denial of the contract by appellee.

The judgment of the lower court so holding is affirmed.

Affirmed.

[No. 2048.]

WILCOX v. THE PEOPLE.

Cities and Towns—Violation of Ordinance—Intoxicating Liquors
—Selling on Sunday.

A party cannot be convicted of violating a town ordinance by selling intoxicating liquor on Sunday where the prosecuting witness purchased the liquor at the instigation of the town for the purpose of laying a foundation for the prosecution.

Appeal from the County Court of Arapahoe County.

Mr. JOHN W. HELBIG, for appellant.

Mr. FRED G. BABCOCK, for appellee.

GUNTER, J.

Appellant was tried and convicted for selling liquor on the Sabbath day in violation of an ordinance of the town of Berkeley and appeals from the judgment.

It clearly appears that the witness purchasing the liquor, for the sale of which defendant was prosecuted, made the purchase at the instigation of the town of Berkeley for the purpose of laying a foundation for this prosecution.

In *Ford v. City of Denver*, 10 Colo. App. 500, 51 Pac. 1015, a prosecution for violation of an ordinance by sale of liquor, the court speaking through Judge Thomson, said: "It appears that the city was instrumental in procuring the sale of the liquor. Its purpose was to lay the foundation for a suit * * * .

* * * the city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which is solicited."—See also *People v. Braisted*, 13 Colo. App. 532, 58 Pac. 796.

Judgment reversed.

Reversed.

[No. 2005.]

McCARTHY ET AL. V. CRUMP ET AL.

Attorney and Client—Employment by Another Attorney—Liability of Client—Instructions.

Where defendants employed an attorney to perform certain services and said attorney employed plaintiffs, who were also attorneys, to assist him, and although defendants knew the services were being performed by plaintiffs, they believed that plaintiffs were proceeding under employment of their attorney and that he alone was liable for their fees, defendants are not liable

to plaintiffs for their fees, and an instruction which told the jury that if plaintiffs performed the services and defendants knew they were being rendered, defendants were liable, is erroneous.

Appeal from the County Court of Gunnison County.

Mr. DEXTER T. SAPP, for appellants.

Mr. THOMAS C. BROWN, for appellees.

GUNTER, J.

Appellees sued to recover for legal services, claiming to have rendered them at appellants' request. That the services were at their request appellants denied, and maintained that they had employed Joseph W. Taylor to perform the services, and that any rendered by appellees were at his instance, and he alone liable therefor.

This presented a vital issue. The evidence thereon, being conflicting and unsatisfactory, emphasized the importance of instructions free from substantial error.

It appeared from the evidence, without dispute, that appellants, McCarthy and McCombe, knew that appellees were acting with Taylor in performing the services; appellants, however, testified that Taylor had contracted with them to perform the services, that they did not retain appellees, and that appellees were so advised. McCarthy and McCombe further testified that at the times when appellees were aiding Taylor they believed that appellees were proceeding under employment of Taylor, and that he alone was responsible for their fees.

If these facts be true, McCarthy and McCombe were not liable. Further, if these facts be true, knowledge on the part of appellants that appellees were discharging the services would not render them liable therefor.

The court charged—Instruction No. 5: “How-

ever valuable the services of these plaintiffs may have been to any of these defendants, yet plaintiffs cannot recover of any defendant who did not employ them to render such services, unless you shall find from the evidence that the plaintiffs rendered such under such circumstances that the defendant or defendants sought to be held * * * knew they were being rendered, or ought to have known that these services were rendered."

Instruction No. 11: "And if you find from a preponderance of all the testimony produced that plaintiffs performed the services * * * on behalf of defendants * * * and that the said defendants knew that such services were being rendered, * * * then it is your duty to return a verdict in favor of plaintiffs against such defendants, for such amounts as you may consider such services reasonably to be worth."

The effect of these instructions was to take from the jury the vital issue, who employed appellees, Taylor or appellants? and instruct them to find against appellants, McCarthy and McCombe. These instructions charged the jury to find against McCarthy and McCombe provided they knew the services were being rendered. It was undisputed that they so knew. As such knowledge alone did not create liability it was error to so charge.

As to appellant Fry, these instructions were likewise prejudicial, because as there was evidence that he knew, or ought to have known, that appellees were rendering these services, the jury might have applied such instructions to such evidence and found against Fry simply because he knew, or ought to have known, that the services were being performed.

It is not likely that other questions presented will arise upon a new trial, if one be had.

Judgment reversed.

Reversed.

[No. 2082.]

THE BOARD OF COUNTY COMMISSIONERS OF SAN JUAN
COUNTY V. TULLEY.

17	118
17	124
17	113
19	219

1. Appellate Practice—Bills of Exception—Motion to Strike.

Motions to strike out bills of exception should be promptly made. Where a bill of exceptions was filed September 16, abstract September 23, and appellant's brief November 3, a motion to strike the bill of exceptions filed December 4, came too late, and will not be considered.

2. Claims Against County—Elections—Printing Notice, Ballots and List of Nominations.

A county is liable for the reasonable value of printing official ballots, election notices and list of nominations, under the election law.

3. Same—Pleading—Illegality of Contract.

In an action against a county upon a bill for printing official ballots, election notices and list of nominations, done at the request of the county, defendant cannot question its liability on the ground that no appropriation was made therefor prior to contracting the debt, unless such defense be specially pleaded and proved.

4. Evidence—Public Printing—Opinion of Witness—Cross-Examination.

In an action against a county for the reasonable value of printing official ballots, election notices and list of nominations, where a witness testified, giving his opinion as to the value of the work, it was error to refuse the defendant permission to cross-examine such witness as to the amount of labor and material which went into the work.

Appeal from the District Court of San Juan County.

MR. EDGAR BUCHANAN (Mr. W. N. SEARCY, of counsel), for appellant.

MESSRS. BARNES & BARNES, for appellee.

GUNTER, J.

Appellee sued to recover compensation for printing official ballots, and printing and publishing election notices and list of nominations. Verdict and judgment were for him below.

1. The bill of exceptions was filed September 16; abstract, September 23; brief of appellant, November 3; appellee's motion to strike the bill of exceptions, December 4; certain exhibits were necessary to make the bill of exceptions complete. These exhibits, consisting of copy of the account of appellee, sample ballot, copies of election notice and newspapers involved, marked "Exhibits A" to "H," so designated in the bill of exceptions, and folioed with the other matter therein, were lodged in this court with the record, and intended as a part thereof, although detached, being in a separate envelope. They were abstracted by appellant, and discussed in its brief. The first objection of appellee to them is his above motion of December 4 to strike. Such motions should come in promptly; applications to amend can then be considered; time and expense saved. This motion comes too late.—*Reynolds v. Campling*, 21 Colo. 86.

2. Appellant contends:

a. That the county is not liable for the bill of appellee, because the statute has not made it so.

The statute provides that the county, through its proper officers, shall have the services performed and the materials furnished for which appellee sued. This duty carries with it the obligation to perform the act, and to provide for its payment.

"When the statutes provide that certain expenses in regard to elections shall be incurred by certain officers of counties * * * but are silent upon the question of payment, the general rule is usually applied, that whenever an active duty is imposed upon municipalities, or public officers representing municipalities, the duty imposed carries with it the obligation on the part of the municipality to perform the act, bear the expense, and provide for its payment."—*Amer. and Eng. Enc. of Law*, 2 ed., 858.

In *Board of County Commissioners of Pitkin County v. Price & McChesney*, 10 Colo. App. 519, 51 Pac. 1011, appellees had judgment below awarding them compensation for publishing the official ticket under the election law here involved. While the case was reversed, the court held that the appellees could recover, and in the course of its opinion said: "The clerk was authorized to give the order to publish the tickets. The paper had the right to print them, and the county became responsible to pay whatever the papers publishing them might be able to show was a reasonable value for the work done, at the place where it was performed, and in the paper in which the advertisement was put."

In *Board of County Commissioners v. Stone et al.*, 11 Colo. App. 476, 53 Pac. 616, *Board of County Commissioners of Pitkin County v. Price*, *supra*, is approved, and the liability of the county for such expenses as herein involved, is conceded.

See also *Board of County Commissioners of Rio Grande Co. v. Bloom*, 14 Colo. App. 187, 59 Pac. 417.

b. That it was necessary to appellee's case to show a prior appropriation under Mills' Ann. Stats., vol. 3, secs. 799a, 799b and 799c.

The county requested appellee to perform the services and furnish the materials, compensation for which is sued for herein; that he complied is not denied. A transaction was thus established, purporting to be an agreement, and apparently binding, to pay to appellee the reasonable value of such materials and services. Appellant could not question this apparently binding contract on the ground of illegality, that is, the absence of a prior appropriation, except by specially pleading and proving such defense. "The rule is well settled, in strict accordance with the true theory of pleading under the codes, that all defenses based upon the asserted illegality of the contract in

suit, which admits the fact of a transaction between the parties purporting to be an agreement apparently binding, but which insist that by reason of some violation of the law the same is illegal and void, are new matter, and must be set up in the answer in order to be provable."—Remedies and Remedial Rights, Pomeroy, page 731, § 708; 1 Enc. Pl. and Pr. 844, and cases cited; *Johnson v. Yuba County*, 103 Calif. 538, 37 Pac. 528; *Brown v. Board of Education of City of Pomona*, 103 Calif. 531, 37 Pac. 503.

If this were a defense—which we do not here decide—it could be availed of only by appellant pleading it. This it failed to do.

c. Appellant further contends that its right of cross-examination was erroneously and to its prejudice limited.

As stated, appellee was suing to recover reasonable compensation for services performed and materials furnished. Near one-half the amount involved was claimed to be due for job work; the reasonable value of which depended largely upon the cost and value of the labor and material which went into the work. His witness and employe, Rogers, gave his opinion of the reasonable value of the work done. In the course of the cross-examination the following appears:

"Q. What do you base that value on?

"A. On the amount of work and stock.

"Q. How much work did it take to set it up and print those ballots?

"Objection sustained and exception.

"Q. How much material did it take—value of material?

"Objection sustained and exception."

Other questions in the same line were propounded, and objections thereto sustained. Counsel was entitled to develop fully by cross-examination

the reasons upon which the witness based his estimate of value. "Where a witness has on his examination in chief given his opinion as to value, he may be cross-examined in full respecting his reasons for such opinion; and here the rule applies that great latitude should be allowed in cross-examination, the limits of which, where no rule of law is violated, are within the discretion of the presiding judge."—1 Thompson on Trials, § 408.

In *Rio Grande County v. Bloom*, 14 Colo. App. 194, 59 Pac. 417, plaintiff sued upon a cause of action similar to that here involved. The court, in the course of its opinion, says: "There was an attempt to cross-examine the plaintiff * * * respecting the subject-matter of his bill, and many questions were put to him directly to the point of the cost and value of the labor and material which went into the publication * * * Defendant's counsel were not permitted to pursue this line of cross-examination, and in this we think the court very clearly erred."

The plaintiff and the witness Rogers were the only witnesses of plaintiff below going to the question of the compensation sued for. The matter above excluded was not otherwise supplied by Rogers. We cannot say that appellant was not prejudiced by the improper exclusion of the above testimony. For this reason the case must be reversed. All questions have been reviewed which will probably be of service in a new trial, should one be had. Judgment reversed.

Reversed.

[No. 2067.]

COMMONWEALTH COMPANY V. NUNN ET AL.

1. Pleading—Practice—Trespass—Motion to Make More Specific.

Where a complaint against several defendants charged them with acting jointly in the commission of certain trespasses,

either through themselves or others, plaintiff was not required to set out the evidence by which the ultimate facts were to be proven, and a motion should not be sustained to require the complaint to be made more specific because it did not designate the particular wrongful act done by each defendant, nor because it failed to allege a conspiracy between the defendants to do the acts charged, nor because it failed to allege that certain individuals who were alleged to have committed acts of trespass were agents of defendants in so acting.

2. Same—Corporations.

Where a complaint charges a corporation with the commission of a trespass, a motion should not be sustained to require the complaint to be made more specific because it fails to allege through what particular officers, agents or employees of the corporation the trespass was committed.

3. Pleading—Practice—Redundant Matter—Motion to Strike.

Where a complaint contains redundant matter, advantage cannot be taken thereof on motion to require the complaint to be made more specific, but the proper remedy is by motion to strike out.

Appeal from the District Court of San Miguel County.

Mr. L. C. KINIKIN, for appellant.

Messrs. STORY & STORY, for appellees.

GUNTER, J.

The complaint avers that plaintiff, at the times therein mentioned, was the owner and in the actual possession of certain mining claims and mill sites, also a stamp mill and other improvements situate thereon; that defendants, at such times, unlawfully, by force and violence, entered upon said premises, destroyed part of a building, and removed a portion of the machinery used in operating said property, and that defendants threaten, by force, to re-enter said premises, eject the plaintiff therefrom, and to destroy the buildings, machinery and other improvements thereon; that defendants will commit such acts unless restrained by order of court.

The insolvency of each of the defendants is also averred.

Defendants Nunn and the transmission company moved an order requiring the complaint to be made more specific and certain. This motion was sustained, plaintiff declined to amend, and to review the resultant judgment of dismissal brought this appeal.

Defendant Nunn says that the complaint does not designate the particular wrongful act done by each defendant; that trespasses are alleged to have been committed by certain individuals, yet it is not alleged that such individuals in so acting were his agents; that it is not alleged that he in any manner conspired with his codefendants in doing the acts charged.

We answer that the complaint charges every act complained of to have been committed by defendants acting jointly either through themselves or others.

Plaintiff was not required to set out the evidence by which these ultimate facts were to be proven.

Defendant, the transmission company, says further that the complaint lacks certainty in not averring through what particular officers, agents or employes of it the supposed trespasses were committed, and that without such specific allegation it cannot investigate and determine whether such trespasses were committed.

This was asking plaintiff to plead its evidence, which it was not required to do.

In *Wood and others v. Minneapolis & St. L. Ry. Co.*, 35 N. W. 5, defendant moved for an order requiring the complaint to be made more definite and certain by alleging the officials through whom it negotiated and entered into the contract, a violation of which was complained of, saying that without such knowledge the complaint could not be safely an-

swered, nor could witnesses without great expense be procured for the trial. The motion was denied, the court saying *inter alia*, "The uncertainty * * * complained of is not as to what the complaint alleges, but as to what particular evidence the plaintiff may produce to support it. * * * What defendant asks is that the plaintiffs be required to plead the names of the particular officers or agents, claimed to have done or committed these acts. * * * To require this would be unprecedented, and subversive of the most familiar and well-established rules of pleading."

Appellees contend that the complaint contains redundant matter. If it does, a motion pointing it out and requesting it to be stricken is the proper remedy.—Code, sec. 60. This course was not pursued. The court erred in sustaining the motion.

Judgment reversed.

Reversed.

[No. 2089.]

MILLER V. THE BOARD OF COUNTY COMMISSIONERS OF
WELD COUNTY.

1. Pleading—Claims Against Counties—Appropriation.

In an action against a county by a physician for medical services and attendance to the pauper patients of the county under a contract with the board of county commissioners, it is not necessary for the complaint to allege an appropriation for that purpose prior to the execution of the contract, if such appropriation was necessary, its absence is a matter of defense to be pleaded and proved by defendant.

2. Contracts—Construction—County Physicians.

Where a board of county commissioners advertised for bids for medical attendance to the paupers of the county for the period of one year, and after receiving and considering the bids passed a resolution accepting the lowest bid, and declaring the physician making it appointed as county physician pending the signing of the contract, it will be concluded that the parties to the contract intended thereby to contract for the time, services, medicine and surgical appliances called for in the notice and bid.

3. Contracts—Construction—County Physicians.

Where a contract between a physician and the board of county commissioners for medical attendance and services to be rendered by the physician to the paupers of the county, in the covenants and agreements on behalf of the physician stipulated that he should furnish medicine and medical and surgical attendance to the pauper patients within the limits of the city, and in the county hospital, pest house and jail, at a fixed sum per annum, and to such patients outside the city limits at a fixed price per visit, which was in accordance with his bid, which was accepted by the board, and in a subsequent clause of the contract the board covenanted and agreed, in consideration of the covenants and agreements of the physician being kept and performed, to pay him in quarterly installments the sum for which he had agreed to attend the patients within the city limits, hospital, jail and pest house, but did not mention the fees for attendance on patients without the city limits, the contract as a whole should be construed as an agreement between the parties that the physician should perform all the services mentioned in his covenant, and that the county should receive and pay for the same the compensation and fees mentioned, notwithstanding the clause containing the covenant on behalf of the board did not mention the fees for attending patients outside the city.

Error to the District Court of Weld County.

Mr. H. E. CHURCHILL, for plaintiff in error.

MESSRS. ESTEB & WOLFF and Mr. WILLIAM HALL THOMPSON, for defendant in error.

GUNTER, J.

The complaint alleges the following contract, to wit: "Physicians contract. This agreement made and entered into this 10th day of May, A. D. 1894, by and between Dr. W. L. Miller * * * of the first part, and J. S. Newell, H. A. Irons and H. J. Parish, who constitute the board of county commissioners of said Weld county * * * of the second part: Witnesseth, That the said party of the first part does * * * agree to and with the parties of the second part, that he * * * will for the consideration here-

inafter named furnish medicine, bandages, dressings, and give medical and surgical attendance to the pauper patients within the limits of the city of Greeley, inmates of the county hospital, diphtheria hospital, pest house and county jail, whether such pauper patients be residents of Weld county, or of some other county, for the period of one year from the date of this agreement, for the sum of \$197.00 and to the poor of the town of Evans at \$1.50 per visit.

"To furnish medicine, bandages, dressings and give medical and surgical attendance to the pauper patients outside of the corporate limits of the cities of Greeley and Evans, the county hospital, diphtheria hospital, pest house and county jail, whether such pauper patients be residents of Weld county or of some other county, for the period of one year from the date hereof, at the rate of fifty cents per visit, with mileage added at the rate of fifty cents per mile, one way, necessarily traveled in making such visit.

"It is also further agreed and mutually understood between the parties hereto:

"First—That no extra charge shall be made by the party of the first part for attending upon any contagious disease.

"Second—That no extra charge shall be made by the party of the first part for attending at any obstetrical or midwifery case, nor attendance at or performance of any surgical operation upon any pauper within the county of Weld by the party of the first part during the life of this contract.

"Third—That the compensation named above shall include any and all charges to be made by the party of the first part as county physician of said Weld county.

"The said parties of the second part do hereby, for said Weld county * * * agree to and with the party of the first part, * * * that they, the said

parties of the second part * * * will and shall, in consideration of the covenants and agreements herein being strictly executed, kept and performed by the party of the first part, as specified, well and truly pay or cause to be paid unto the party of the first part * * * the sum of one hundred and ninety-seven dollars payable in quarterly installments of \$49.25 each.

“It is further agreed by and between the parties hereto that either party may discontinue the stipulations and agreements herein contained by first giving, at least, thirty days notice of such discontinuance to the other party.

“In witness whereof, the said parties to these presents have hereunto set their hands and seals this 10th day of May, A. D. 1894.

“W. L. Miller, M. D., party of the first part.

“J. S. Newell, H. A. Irons, H. J. Parish, county commissioners of Weld county, parties of the second part.”

The complaint further alleges that plaintiff therein duly performed his duties as required by said contract, so far as the same were called to his attention, and that he was at all times ready and willing to furnish and perform all that was required of him as county physician of said county under the terms of said contract.

It is further alleged that defendant violated said contract in employing various other physicians and surgeons to furnish medicine and medical appliances and give medicine and surgical attendance to various pauper patients in the town of Evans in said county and to various pauper patients residing outside of the cities of Greeley and Evans, and the poor house and county jail in said county; that thereby plaintiff had sustained damages in a certain sum.

The answer so far as material to this ruling,

admits the contract, denies its breach and any damages consequent from its alleged violation.

The lower court gave judgment upon the pleadings and dismissed the action upon the ground that the complaint failed to state a cause of action.

Defendant in error in support of this ruling contends:

1. That the complaint in omitting to allege an appropriation prior to the making of such contract from which to meet the expenditure to be incurred thereby, as provided by Mills' Ann. Stats., vol. 3, secs. 799a, 799b and 799c, did not state a cause of action.

If such appropriation was necessary to the validity of the contract—which we do not decide—its absence was matter of defense and incumbent upon appellee to plead and prove.—*The Board of County Commissioners of San Juan County v. Thomas H. Tulley*, ante, p. 113; Remedies and Remedial Rights, Pomeroy, p. 731, § 8; 1 Encyclopedia of Pleading and Practice, § 844, and cases cited; *Brown v. Board of Education of City of Pomona*, 103 Calif. 531, 37 Pac. 503; *Johnson v. Yuba County*, 103 Calif. 538, 37 Pac. 528.

2. In support of the holding below appellee further contends that the above contract is void for lack of mutuality in this, that while the contract discloses that appellant, plaintiff below, offered to perform the services therein enumerated and to furnish the medicine and medical appliances mentioned for the fees stated therein, that appellee never agreed to pay such fees; that the covenant of appellee is found in the following portion of the contract, to wit: "The said parties of the second part do hereby * * * agree * * * with the party of the first part * * * that they, the parties of the second part * * * will and shall in consideration of the cov-

enants and agreements herein being strictly executed * * * by the party of the first part as specified will * * * pay * * * unto the party of the first part * * * the sum of \$197.00 payable in quarterly installments of \$49.25 each."

It appears from the complaint that April 11, 1894, appellee gave public notice to the physicians of the said county that it would receive proposals from said physicians May 8, 1894, for the performance of services and furnishing of materials and surgical appliances enumerated in above contract for one year. Appellant filed his bid in conformity with the notice. It further appears that May 9, 1894, appellee passed the following resolution: "The several bids for county physician were opened and that of Dr. W. L. Miller being the lowest the board declared him appointed pending the signing of the said contract."

The complaint then avers the making of the contract in pursuance of the accepted bid.

It is a reasonable conclusion from these preliminaries that the parties to the contract intended thereby to make one for the time, services, medicine and surgical appliances called for in the notice and bid.

The contract other than the section relied upon by appellee is a clear agreement between the parties thereto, the one to perform services, furnish medicines and surgical appliances for one year at the fees therein stated, and on the part of the other to accept such services, medicines and surgical appliances at the prescribed fees. It certainly was not the intention of the parties by the clause cited by appellee to nullify that to which in the earlier part of the contract they had agreed, yet such would be the effect if the construction claimed by appellee were placed upon the instrument. Furthermore, it would annul the contract.

If the part of the contract relied upon by appellee to defeat it, is construed simply as a repetition of the preceding clause, providing the fees for furnishing medicine, surgical appliances and giving professional services to the pauper patients within the limits of the city of Greeley, inmates of the county hospital, diphtheria hospital, pest house and county jail for the period of one year, and given no further effect, and the contract as a whole is construed as an agreement between the parties, that the one shall perform all services, furnish all medicine and surgical appliances mentioned in the contract for the period of one year at fees stated, and that the other shall receive and pay for the same for such time at such fees, the construction will be in accord with the intention of the parties as shown by the preliminaries leading up to the contract, will be reasonable, harmonious effect will be given to every part of the instrument, and as between the two constructions, the one upholding, and the other invalidating the contract, the one sustaining the contract will have been adopted.

This construction upholding the contract meets our approval. The court erred in holding that the complaint did not state facts sufficient to constitute a cause of action.

Judgment reversed.

Reversed.

[No. 1877.]

SCHOLLAY, NEE LYNEMAN, v. MOFFITT-WEST DRUG
COMPANY.

1. Appellate Practice—Instructions—Exceptions.

If instructions to a jury embrace distinct legal propositions, and any one of the propositions is sound, such instructions can not be reviewed by the appellate court upon a general exception to the charge, but if the charge is wholly bad or embraces but

a single legal proposition, a general exception is sufficient, and special exceptions are unnecessary.

2. Principal and Agent—Notice.

Notice received by an agent affecting the business he is authorized to transact while he is engaged in its transaction is notice to his principal.

3. Principal and Agent—Ratification.

Knowledge of all the material facts is essential to the ratification by a principal of the unauthorized acts of an agent.

4. Same—Purchase and Sale of Goods by Agent.

Where defendant, a married woman who owned a drugstore conducted by her husband as her manager, in person notified plaintiff, a wholesale drug company, through its traveling salesman, that she would not purchase any goods from plaintiff, and afterwards the same salesman sold and delivered to her husband as her manager certain bills of goods, if defendant had no knowledge of the purchase of the goods by her husband, nor of the delivery thereof at the drugstore, nor of the sale thereof and receipt of the proceeds for her by her employees, there could be no ratification by her, and without a ratification there was no sale to her, and an action against her upon a contract for goods sold and delivered must fail.

5. Principal and Agent—Sales—Ratification—Instructions.

In an action for goods sold to defendant's unauthorized agent in several different bills evidenced by orders made at different times by the agent, an instruction that an appropriation by defendant of any portion of the articles purchased would render defendant liable for the whole, was erroneous. An appropriation of the goods or a portion of the goods purchased under one order or contract would not be a ratification of a purchase under an entirely separate and different contract.

6. Principal and Agent—Sales—Authority of Agent—Ratification.

In order to recover for goods sold to defendant's agent after defendant had notified plaintiff that she would buy no goods from it, it must be shown either that the goods were purchased by defendant's authority or that she ratified the purchase with full knowledge of the facts.

Appeal from the District Court of Arapahoe County.

Mr. R. D. THOMPSON, for appellant.

Mr. THOMAS B. STUART and Mr. CHARLES A. MURRAY, for appellee.

THOMSON, J.

The Moffitt-West Drug Company brought this action against E. Pauline Lyneman to recover the price of goods, wares and merchandise, alleged to have been sold and delivered by it to her. The answer was a denial. Judgment went in favor of the defendant, and the plaintiff appealed to this court, where the judgment was reversed.—*Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249.

The trial which followed the reversal, resulted in a judgment for the plaintiff, and the case is now here by the defendant's appeal.

Upon some matters of controlling importance, the evidence was conflicting; and if the case was properly submitted to the jury, we are powerless to disturb their verdict.

It appears that the defendant was the proprietor of a drug store, known as Lyneman's Pharmacy, which was managed by her husband, F. A. Lyneman, as her agent. Her testimony was that on a day in July, 1893, happening to go to her store, she found in the room Mr. John J. Smythe, the traveling salesman of the plaintiff, endeavoring to obtain an order from her husband for a bill of goods; that she then and there told him that she wanted him to keep out of the store; that she did not want her husband to buy any goods east, because she could not keep track of the purchases; that she wanted her goods bought in Denver, from two houses which she named, for the reason that she knew just what goods were needed, and what should be bought; and if her husband bought at those houses she could keep herself advised of his movements. It appears from her statements that she had very little confidence in her husband's business capacity, and disliked his methods; and hence her anxiety to be able to follow his transactions. The goods, for the price of which this action

was brought, were all sold to the pharmacy after the defendant, according to her testimony, notified Mr. Smythe that she wanted no goods from his house. She also stated that she had no knowledge that any goods from that house had come into her store; and we find no tangible evidence in the record that she ever knew anything whatever about any of such goods, except it might be one barrel of whiskey. Concerning that, she denied knowledge that it came from the plaintiff, but her denial was contradicted. Mr. Lyneman died on the 19th day of June, 1894, and the defendant, after the first trial, became Mrs. E. Pauline Schollay. The evidence on the subject is unsatisfactory, but it may be conceded that with the exception of the whiskey, all the goods received from the plaintiff were placed upon the shelves in the storeroom, and, in due course of business, were sold with the other goods. The defendant's statement of the conversation with Mr. Smythe, was contradicted by him.

Upon the evidence, the court instructed the jury orally, as follows:

"If you believe from the evidence that the plaintiff sold and delivered to the Lyneman Pharmacy, and you find that the defendant was the principal and owner of the business carried on and conducted in the name of the Lyneman Pharmacy, and that the defendant was doing business in such name, and you find that the merchandise was delivered at the premises, and in the store of the defendant, and that the defendant personally, or through her agent, received such goods and disposed of them for her own benefit, and appropriated the proceeds thereof to her own use, then the defendant is liable in this action, and you should return a verdict in favor of the plaintiff for the value of the goods so sold, so delivered and so received, and so appropriated by the defendant.

And under such facts the plaintiff would be entitled to recover, whether the defendant had or had not knowledge of what the agent did, and whether there may or may not have been a limitation on the agent's authority.

"In order to justify you in finding for the plaintiff, you must find from a preponderance of the evidence, that the goods and merchandise in question were sold and delivered to the Lyneman Pharmacy. And if you find from the evidence that a certain bill of merchandise and goods was in the manner as we have described, sold and delivered to the said pharmacy, and that the defendant was the owner of the business, and carrying on her business in that name, and you further find from the evidence that the defendant personally, or through her agent, disposed of any part of the said bill of goods and merchandise, and appropriated the proceeds thereof to her own use, and you find from the evidence, under these instructions, that the defendant is liable for such portion of the bill of goods, then and in that case the defendant would be liable for the entire bill of goods to the extent of the items and amount of the entire bill of goods which were sold and received at her place of business, provided you find that such entire bill of goods was sold and received by the defendant, either personally or through her agent, and that the same were placed in the store and mingled with the goods and merchandise of the premises and store of which the defendant was the principal and owner, and you find that such goods were sold and disposed of by either the defendant personally, or her agent, and the proceeds thereof went into the funds of the defendant, and were retained by her.

"If you find from the evidence that the plaintiff did not sell the merchandise in question to the Lyneman Pharmacy, and deliver the same to the Lyneman

man Pharmacy, and that the same, nor any part thereof were appropriated, and the proceeds thereof not appropriated by the defendant, personally, or through her agent, and that the proceeds thereof did not go into and become mingled with the funds of the defendant, and that the defendant did not retain the same, then and in that case, you should find for the defendant, with reference to the entire bill of goods.

“In determining these questions, you should take into consideration all of the evidence that has been offered in the case, and from and upon that evidence return your verdict.

“It has been contended on the part of the defendant, that the defendant instructed one Smythe, who it is said was a salesman for the plaintiff company, upon a certain occasion, in the defendant's store, that her husband, Lyneman, was forbidden to purchase goods from any house other than two certain houses named, in the city of Denver, inclusive of the house which Smythe represented. And it is contended that she told Smythe that she would not permit Mr. Lyneman to purchase any goods at his house, and evidence has been offered in reference to such contention. If you find that the defendant did, on that occasion, notify the salesman, and you find that salesman to be the person who subsequently sold the goods to the agent of the defendant, and you find that the goods in question were sold to such agent, Lyneman, the husband, and were not sold to the Lyneman Pharmacy, of which the defendant was owner or principal, and you find that the defendant, either personally or through her agent, did not receive the said bill of goods, or any part thereof, and did not mingle them with the other goods in her store, and did not, through herself personally, or through her agent, appropriate the same, or any part thereof, by selling and disposing of them, and by appropriating the

proceeds thereof to her own use, then and in that case the defendant would not be liable for any part of the bill of goods alleged to have been sold to the Lyneman Pharmacy, the defendant in this case.

“The law is, that though the defendant may have limited the power and authority of her agent in purchasing goods, though she may have notified the plaintiffs in this case, through their agent Smythe, of such limitation, if she subsequently ratified the act of Lyneman, her husband, in purchasing the bill of goods in whole or in part, she would then become liable for the bill of goods in question. And after having limited the power and authority of her agent, by notice to the plaintiff, through its agent Smythe, if such he was, if Lyneman subsequently purchased the bill of goods (I mean Lyneman, the husband), and placed them in her store, and she appropriated the goods, or any part thereof, either personally or through her agent, by mingling them with her goods, and selling the same, and appropriating and retaining the proceeds thereof, such would be in law, a ratification of the acts of her agent, even though he had theretofore been limited in his power or authority to bind the principal, the defendant.

“And the law is that a person cannot ratify a part of a contract, without becoming liable for the entire contract, and under these instructions, you will determine from the evidence under the law whether the plaintiff is entitled to a verdict in this case, and if so, determine the amount that the plaintiff is entitled to recover, and by the same rule, determine whether or not the defendant is entitled to a verdict.”

The court refused a number of instructions requested by the defendant; but because they were not prepared or presented in accordance with the requirement of the law, the court was authorized to reject them, and its action in that regard cannot be

reviewed by us. The oral charge was met by one general exception on the part of the defendant, and it is urged upon us that this was insufficient. If the charge embraced distinct legal propositions, and any one of the propositions was sound, the general exception was useless.—*Webber v. Emerson*, 3 Colo. 248; *Railway Co. v. Ward*, 4 Colo. 30; *Keith v. Wells*, 14 Colo. 321.

Conversely, if the charge was wholly bad, or embraced but a single proposition, special exceptions were unnecessary. We think a critical examination of the charge will disclose, in the multitude of words which compose it, but one legal proposition. That proposition is that the sale of the goods to the defendant's agent, and the appropriation by the defendant of their proceeds, in whole or in part, would render her liable for the plaintiff's full claim. The proposition appears in different language, in different parts of the charge, and is stated in both affirmative and negative form; but whatever the language, and whatever the form, a close examination resolves it into the same proposition. To this one proposition but one exception was necessary.

A discussion of the instruction necessitates a consideration of the evidence. Mr. Lyneman was the general manager of the defendant's store, and, as such, had authority to do whatever she might herself do in the transaction of her business, subject, necessarily, however, to instructions from her. She testified that she determined to buy no more goods from the plaintiff, she so informed Mr. Smythe, the plaintiff's traveling agent, in July, 1893, in the presence of her husband, while the former was soliciting an order from the latter for a bill of goods. The sales which resulted in this suit, were all made after that time; and there was no evidence that her determination was ever changed. Her statement was de-

nied, and the question whether she gave the notice to which she testified, was one of the controlling questions in the case. But the trial judge seems to have been of a different opinion; and, furthermore, as we infer, was in some doubt as to whether the notice to Mr. Smythe bound the plaintiff. But Mr. Smythe was the agent of the plaintiff for the sale of its goods. His acts, in connection with the subject-matter of his agency, were binding on his principal; and any notice received by him, affecting the business he was authorized to transact while he was engaged in its transaction, was notice to his principal.—*Flower v. Elwood*, 66 Ill. 438; *Reynolds v. Engersoll*, 11 Smedes & M. 249; *Smith v. Commissioners*, 38 Conn. 208; *Slater v. Irwin*, 38 Iowa 261; *Hart v. Bank*, 33 Vt. 252; *Dresser v. Norwood*, 17 C. B. N. S. 466; Story on Agency, § 140; Mechem on Agency, § 718.

On the hypothesis of the truth of the defendant's testimony, notice was given by her to Mr. Smythe that she would not purchase goods from the house he represented; and it was given at the very time he was endeavoring to make a sale to her husband. In some of the cases to which we have referred, it is held that the principal is chargeable with knowledge acquired by the agent in another transaction, or even before the existence of his agency, unless from lapse of time, or other circumstances, it may be presumed that the knowledge is no longer present to his mind. And such is the doctrine of the supreme court of the United States.—*The Distilled Spirits*, 11 Wall. 356.

But the notice to this agent was given, if it was given at all, while he was engaged in the very business of his principal which the notice affected; and by all the authorities, his principal was bound by the notice. We cannot forbear remarking a feature of the case, by which the general principle is emphasized. The same agent who received the no-

tice, acting for the same principal, made the sales.

In order to reach a correct result it was necessary that the question whether the defendant had knowledge that the plaintiff's goods went into her stock should be determined. The theory of the instruction is that if the goods were delivered into the pharmacy, and were sold by the employees of the defendant, and the proceeds put into her possession, there was a ratification of the purchase by her, and her liability was the same as if she had herself ordered the goods. It may be admitted that the goods were delivered into the pharmacy; that they were sold by the employees of the defendant, and that the proceeds were put into her possession. But those facts alone do not constitute ratification. If the plaintiff was notified through its agent that she wanted none of its goods, then something more than the facts supposed by the instruction, was necessary to fasten a liability upon her for goods sold and delivered. If she had no knowledge of the purchase of the goods by her manager, or their delivery into the pharmacy, or the sales by her employees, or the receipt of their proceeds for her, there could be no ratification. A knowledge of all the material facts is essential to the ratification by a principal of the unauthorized act of his agent.—Wharton on Agency, § 65; Story on Agency, § 243; Mechem on Agency, § 249.

If her agent had no authority to make the purchase, and the plaintiff was so advised, a ratification by her was necessary to validate the unauthorized acts; without such ratification there was no sale to her, and an action against her upon a contract for goods sold and delivered, must fail. There is no such thing as making one a purchaser without his consent. Where there is no meeting of minds, there is no contract. It may be that because the defendant received the money for which her employees sold the

goods, she would be liable to the plaintiff in an action of some kind for its recovery. But if, against her prohibition, the plaintiff surreptitiously, by connivance with her agent, put goods into her store which it knew she did not want, expecting to make her a purchaser against her will, and she received the proceeds in ignorance of the facts, we are not sure a recovery against her upon any theory, would be necessary to satisfy the requirements of justice. Certainly, however, there could be no recovery upon a contract for goods sold and delivered.

At the trial the first question to be determined was whether the defendant prohibited the plaintiff, through its agent, from selling goods to her manager. If that question should be resolved against her, it would only be necessary to find the amount of her liability and render judgment accordingly. But if that question should be decided in her favor, then, until a determination of the question what, if any, knowledge she had of the receipt and disposition of the goods, no other step could be taken. The theory of the instruction was that those questions were not in the case.

Furthermore, the instruction assumed that the purchases of the goods in question constituted but one transaction, and accordingly announced that an appropriation by the defendant of any portion of the articles purchased would render her liable for the whole. The assumption was contrary to the fact. The purchases did not constitute one transaction. There was a number of separate contracts, without connection with each other, evidenced by orders made at different times by F. A. Lyneman. The barrel of whiskey was the subject of a contract distinct from, and entirely independent of, the others. It was the last purchase made. There was evidence from which the jury, if properly instructed, might have found

that the defendant disposed of the whiskey with knowledge that it had been furnished by the plaintiff. Upon such finding judgment might properly have gone against her for the purchase price of that whiskey, but her status in respect to the other articles would have been unaffected. Still, in order to charge her with the whiskey, as having been sold and delivered to her, it must be shown either that it was bought by her authority, or that she ratified its purchase with full knowledge of the facts. The instruction was totally and irretrievably vicious.

A recent case in the supreme court of the United States, in its facts, bears a very striking resemblance to the case at bar; and the controlling principle of each of the cases is the same. Mr. Justice Brewer delivered the opinion of the court, saying:

“On the general merits of the case, it may be observed that the action is on a contract for goods purchased by defendants. If no such contract of purchase was in fact made, the verdict was right; and this, although goods of the plaintiffs were surreptitiously put into the possession of defendants, and the proceeds of sales made thereof by their employees passed into their hands. While from the fact that goods belonging to one party pass into the possession of another a contract of purchase may sometimes be implied, it will not be implied when it appears that such transfer of possession was surreptitious, and without the knowledge of the latter. A party cannot be compelled to buy property which he does not wish to buy; and no trick of the vendor, conspiring with an agent of such party, by which possession is placed in him, creates on his part a contract of purchase. Nor is any contract of purchase created, even if it also appears that, unknown to the party, his agent who had entered into this wrongful combination has sold the property and put the proceeds into

his principal's possession. Whatever liability might exist in an action brought under those circumstances, for money had and received, no action will lie for goods sold and delivered. The party is not responsible under a contract and as a purchaser, whatever may be his liability for the moneys which he has received as the proceeds of the sales."—*Shutz v. Nor-don*, 141 U. S. 213.

But, in behalf of the plaintiff, it is insisted that the theory of the instruction was the theory upon which this court reversed the judgment when the case was here before, and the proposition is ably and elaborately supported by counsel. Let us see how far this statement is borne out. In the opinion, which was prepared by Bissell, J., after some observations respecting the barrel of whiskey, the following is said:

"While she (the defendant) did not admit that she knew the other goods were purchased and put into the general stock, she did not specifically deny having this information. * * * Even though it be conceded she told the salesman that her general agent must no longer buy goods of the company, yet the subsequent purchase, coupled with the fact that the goods went into the stock, and therefore, *presumably* to the knowledge of the principal, must, under these circumstances, bind her."

The purport of the foregoing is that in the absence of any evidence on the question of the defendant's knowledge, from the fact of the purchase and the delivery of the goods into the stock, the knowledge of the plaintiff would be presumed, and she would, therefore, be bound by the purchase. At this point the case was disposed of; and nothing further was required in the opinion, except a formal announcement of the judgment.

But the opinion, nevertheless, proceeded further; and it is out of language subsequently used that the

confusion has arisen. The effect of that language is that because the proceeds of the goods passed into the hands of the defendant, she became liable upon the contract of purchase, notwithstanding her ignorance of the fact of the purchase. The questions involved in the case had already been decided; and the observations and expressions which followed were totally unnecessary. They were statements of the views of the framer of the opinion upon a subject which was not considered by the court in making up its judgment, and were therefore only dicta.

At the last trial the defendant introduced evidence tending to show that the goods of the plaintiff were mingled with goods of the defendant, and, together with them, sold, and the proceeds turned over to her, without knowledge on her part that any goods of the plaintiff had come into her store; and because the question of her knowledge, together with the question whether to the knowledge of the plaintiff she had forbidden purchases from it, was not submitted to the jury, the judgment must be reversed.

Reversed.

[No. 2084.]

GRAY V. SHARP ET AL.

1. Evidence—Order of Introduction—Admissions.

Where plaintiffs' witnesses testified that a certain transaction by defendant was a sale, and defendant, in his own behalf, testified that it was only a temporary loan, it was permissible for plaintiffs to call witnesses on rebuttal to testify to admissions made by defendant that the transaction was a sale.

2. Same.

In an action of replevin for a wagon, where plaintiffs claimed that their vendor had bought the wagon from defendant, and defendant claimed to have temporarily loaned the wagon to said vendor, and after said vendor had testified on behalf of plaintiffs that he bought the wagon from defendant, plaintiffs rested, and defendant, in his own behalf, testified that he did not sell the wagon but only loaned it, whereupon plaintiffs called other wit-

nesses on rebuttal, who testified that defendant had told them that he sold the wagon to plaintiffs' vendor, it was error to refuse to permit defendant to be recalled to deny or explain said admissions.

3. Instructions—Not Responsive to Issues—Sales.

In an action of replevin for a wagon where plaintiffs claimed that their vendor purchased the wagon from defendant, and defendant denied that he sold the wagon, but claimed that he had only temporarily loaned it to plaintiffs' vendor, and there was no evidence tending to show that defendant invested said vendor with apparent ownership and title to the wagon, or permitted him to hold himself out to the world as the owner, it was error to instruct the jury that, although defendant had not sold the wagon to said vendor, if he invested him with apparent ownership and permitted him to hold himself out to the world as the owner, and on the strength of such apparent ownership, plaintiffs purchased it for a valuable consideration, they should find for plaintiffs.

4. Same—Fraud.

In an action of replevin where the only issue was as to whether defendant had sold the wagon in controversy to plaintiffs' vendor or had only loaned it, it was error to instruct the jury upon the question of fraudulent conveyance of personal property.

Appeal from the County Court of Otero County.

Mr. O. G. HESS, for appellant.

Mr. R. S. BEALL and Mr. FRED A. SABIN, for appellees.

WILSON, P. J.

Plaintiffs Sharpe and Downey commenced this suit in replevin to recover possession of a wagon, basing their claim of title and right of possession upon the purchase by them from one Tracy Marsh, who it was claimed had bought the wagon from defendant. The defense was a denial of any sale by defendant to Marsh, and a claim of ownership by defendant. The possession by Marsh at the time of his pretended sale to the plaintiffs was explained on the ground that the

defendant Gray had temporarily loaned the wagon to him. Upon trial, plaintiffs introduced witnesses to prove a sale and delivery to them by Marsh, and the payment of a consideration. One of these witnesses was Marsh himself, who testified on cross-examination that he had actually bought the wagon from Gray, and had not borrowed it. On the part of the defense, evidence was then offered, principally the testimony of the defendant himself, in which it was positively denied that any sale had ever been made by defendant to Marsh. Defendant also testified that he had simply loaned the wagon to Marsh for temporary use until needed. In rebuttal, plaintiffs recalled Marsh, who testified in their behalf at more length in regard to the sale by Gray to him, and who positively denied that he was in possession of the wagon by reason of having borrowed it from Gray. Plaintiffs also introduced four or five witnesses, each of whom testified to the effect that defendant had told them respectively, at different times and places, that he had sold the wagon to Marsh. The defendant was then recalled by his counsel for the purpose, as stated, of denying and explaining these admissions testified to by the witnesses. The court, however, refused to allow him to be examined. In this we think there was material error. We do not agree with defendant's contention that the testimony as to these admissions was inadmissible at all in rebuttal, but should have been offered in the evidence in chief. They were properly receivable in rebuttal, but as they were really in the nature of new matter, furtherance of justice required that the defendant should have had the opportunity of which he sought to avail himself, to have placed before the jury a denial, or any explanation which he could make, of the admissions. The order of proof on a trial is largely, even under the requirements of the code, discretionary with the

court. Ordinarily, the rebutting evidence offered by him upon whom the burden of proof rests, concludes the introduction of evidence, but not always. Within the discretion of the court, for good reasons in furtherance of justice, the other party may be permitted to introduce evidence in response to that called forth by the rebuttal testimony.—Civil Code, sec. 187; Thompson on Trials, § 306, *et seq.* It is a matter resting within the sound discretion of the trial court, but this discretion must not be exercised to the prejudice of a party. As aptly said by the supreme court of Missouri, "Those rules for the orderly conduct of proceedings in courts of justice, which the law in its wisdom has placed somewhat in subjection to the discretion of the court must be enforced, or relaxed, by the court in furtherance of justice, and are not to be applied with such technical precision and unbending rigor as to produce injustice."—*Tierney v. Spiva*, 76 Mo. 282.

In this instance, we think the discretion of the court was unsoundly exercised. By it the defendant may have been placed at a great disadvantage. While on the witness stand he was not interrogated as to these alleged admissions, and he had no reason to anticipate, so far as the record shows, that these witnesses would testify to any such admissions made by him, and neither the trial court nor this court has a right to say that he could not have satisfactorily explained them. In any event, he was entitled to have his denial or explanation go to the jury.

One instruction which the court gave was as follows:

"You are instructed that if you find from the evidence that the defendant Alexander Gray did not so sell said wagon, but you do find that he on or about the first day of September, 1898, invested Tracy Marsh, the party from whom plaintiffs claim to have

purchased the wagon, with apparent ownership and title of said wagon, and permitted him, the said Marsh, to hold himself out to the world as the owner of said wagon, and on the strength of said apparent ownership plaintiffs purchased it for a valuable consideration, no matter how great or how small, it will be your duty to find for plaintiff."

In so far as this instruction attempted to state an abstract proposition of law, it might be correct, and might be well given in a proper case, but this was not such a case. As appears from the evidence embraced in the abstract, the question upon which the court attempted to instruct the jury was not raised—was not in issue. There was no evidence upon which to base it. All the testimony to which the instruction could possibly be construed to have application seems to have been only incidental, and there was none of it inconsistent with the claim of defendant that he had simply loaned the wagon to Marsh. We find no evidence tending to show that the defendant invested Marsh with apparent ownership and title to the wagon, or permitted him to hold himself out to the world as the owner.

The court also gave another instruction as follows:

"You are further instructed that the statute of Colorado provides that no conveyance of personal property shall be adjudged fraudulent against purchasers solely on the ground that it was not founded on a valuable consideration, and before fraud can be set up in a sale of personal property it must appear that the purchaser had previous notice of the fraudulent intent of his immediate grantor, and the burden of proving this notice in this case is on the defendant."

We are unable to determine from the record upon what this instruction was based, or to what it was

intended to apply. The question at issue was not whether the sale if made at all from defendant to Marsh was fraudulent, nor whether the sale from Marsh to plaintiffs was fraudulent. It was whether there had been a sale at all by defendant to Marsh, or whether the wagon had simply been loaned. In other words, all of the testimony seems to have been directed to the issue as to whether Marsh had any title at all which he could sell or convey. The giving of this instruction, therefore, was also error, in the light of the evidence presented.

For these reasons the judgment will be reversed.

Reversed.

[No. 2085.]

JONES ET AL. V. OLSON.

1. Homesteads—Execution Liens.

Where an execution was sued out and levied upon real estate prior to the designation of the real estate as a homestead by the execution defendant, the execution lien is superior to the homestead claim.

2. Executions—Levy upon Real Estate.

Where a sheriff, upon receipt of an execution, made out and published in a newspaper a notice of sale of certain real estate under the execution, in which the execution was described, and it was stated that he had levied upon the real estate as the property of the execution defendant, and filed a copy of such notice with the clerk and recorder of the county, it was a legal and valid levy.

Error to the District Court of Lake County.

Mr. WM. H. HARRISON, for plaintiffs in error.

Mr. JAMES GLYNN, for defendant in error.

WILSON, P. J.

By this suit the plaintiff Olson sought to perpetually enjoin the sale of certain real estate by the sheriff, Daniels, one of defendants, under an execution

issued out of the office of the clerk of the district court of Lake county on a transcript of a judgment of a justice's court of the same county against him, and in favor of defendant Jones. It appeared from the complaint that the judgment was rendered by the justice on December 19, 1898, that on December 23, a transcript thereof was filed in the office of the clerk of the district court of the county, and that, on the same day, an execution was issued thereon by said clerk, and placed in the hands of the defendant sheriff, who levied upon the real estate, by causing to be published in a newspaper a notice of such levy, and that he would sell the property on the 25th of January following, and by filing a copy of said notice with the clerk and recorder of the county. On January 24, the day previous to the advertised date of sheriff's sale, the plaintiff Olson took such steps as were necessary to declare the premises advertised for sale to be his homestead, so as to exempt it from levy and sale upon execution. The defendants demurred generally, and also specially, upon the ground that the lien by levy of execution attached to the land before the entry of homestead was made and entered. This demurrer was overruled. Defendants failing to answer, judgment was rendered against them.

The contention of defendant in error in support of the ruling of the court is that the plaintiff in the judgment having failed to file the justice's transcript in the office of the recorder of the county as required by statute, in order to give a judgment lien, had acquired no lien for his judgment, and that the mere issuance or levy of an execution being insufficient to give a lien, the homestead entry or withdrawal having been made before the sale was sufficient, and that the property thereupon became exempt. To this point counsel direct almost their entire brief.

A diligent and careful reading of the complaint fails to disclose anywhere an allegation that there had been a failure to file a transcript of the judgment in the office of the county recorder so as to initiate a judgment lien in the statutory manner. This question, therefore, even if material, could not be considered. It is wholly immaterial, however, to the determination of this suit as now pending in this court on error, or, in fact, of the cause upon its merits. It matters not whether the transcript of the judgment had or had not been filed in the recorder's office prior to the attempted dedication of the real estate as a homestead. Irrespective of this the complaint alleges sufficient facts to show not only that it did not state a cause of action against the defendant, but also that upon trial on the merits, taking the conceded facts, judgment should have been in favor of the defendant. The statute provides that a homestead claimed in the proper manner shall be "exempt from execution and attachment." In *Barnett et al. v. Knight et al.*, 7 Colo. 371, the court said: "We think that under our statute, the householder is in ample time if he records this election before a lien attaches in favor of his creditor." Upon reason, we think the converse of the proposition would also be true. The householder would not be in time to avail himself of the exemption if he recorded the election after the lien of an execution or attachment attached. This conclusion would seem also to be in accord with, and to necessarily follow from the principles enunciated both by the supreme court and by this court in construing the homestead law in other cases. In *Woodward v. National Bank*, 2 Colo. App. 372, this court said: "The homestead is 'exempt from execution or attachment.' The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as

a homestead, it was exempted from the levy of the execution. * * * The plaintiff in error, having designated the land as homestead before the execution was sued out, the property was exempt from its operation." This has been expressly approved by the supreme court.—*Weare v. Johnson*, 20 Colo. 366.

In the case at bar the execution had not only been sued out, but had actually been levied upon the property before the plaintiff took any steps to avail himself of the statutory privilege of exemption. The lien of the execution had already attached by virtue of the levy, and his efforts to obtain exemption came too late. The homestead law should be, and is, liberally construed, but it would be carrying construction beyond all reason, as well as beyond all precedent, to hold that the legislature intended to give a householder the right of exemption from execution after the property had been actually levied upon, and taken under execution, and the lien of the execution had attached. This would be unwarranted interference with vested rights, and neither the language nor reason of the statute would justify such a construction.

Plaintiff seems to deny, however, that there was a legal or sufficient levy of the execution. We think that there was. The statute of Colorado prescribes no particular method of procedure for the levy of an execution upon real estate where the property is in the same county in which the judgment is rendered, or in which the execution is issued. As to how it shall be made, or how it should be evidenced, the statute is silent. In considering this question, this court said: "As the officer cannot reduce the land to possession, or do any act upon it against the will of the owner, all that can be required is, that he designate the particular land which he intends to subject to his execution in such a way that it may be identi-

fied, and this he can do without leaving his office if he has the proper information. The designation is a mental act; but, in order that it may be valid as a levy, it must be embodied in some visible memorial—some record of what was done, accessible to the judgment debtor and to the public. Strictly speaking, the record is not itself a levy; it is merely the evidence that the levy was made, but as the statute does not require that the record shall be made upon the writ, no reason is apparent why it may not be made elsewhere, provided it is equally public and permanent.”—*Herr v. Broadwell*, 5 Colo. App. 470. In that case the sheriff, upon receipt of the execution advertised the realty for sale, and in the advertisement set forth that he had levied upon the property by virtue of the executions, and the advertisement was incorporated into his return upon the writs. This was held to be a record of the levy, which was made in such a manner that it was notice to all the world of the fact. The levy was held to be valid, and the evidence of it sufficient. We think the case under consideration is stronger than that in support of a levy. Here it appears, according to the complaint, that the sheriff immediately upon the return of the execution, made out and published in a newspaper a notice of sale under execution, in which the execution was described and a statement made that he had levied it upon the property of the plaintiff now in controversy, and that in addition to this he had filed a copy of such notice of sale with the clerk and recorder of the county long prior to the time when plaintiff sought to avail himself of the homestead law.

The contention of plaintiff that the levy was invalid because the sheriff had not made a record of it upon the records in his office, is without force.—*Herr v. Broadwell*, *supra*.

For these reasons we are of opinion that the

demurrer to the complaint, both as to its general and special grounds, should have been sustained, and that upon the facts as stated by the plaintiff with reference to the issue and levy of the execution, and the attempted homestead withdrawal, the defendants would be entitled to judgment.

The judgment will be reversed.

Reversed.

[No. 2081.]

CHENEY ET AL. V. MURTO, ADMINISTRATOR OF
TURBUTT'S ESTATE.

Bills and Notes—Trust Deeds—Unauthorized Foreclosure—Purchaser with Notice.

Where the payee of a note secured by a deed of trust transferred the note before maturity, and afterwards through fraudulent representations obtained from the holder possession of two unpaid interest coupons cut from said note and without the knowledge or consent of the owner of the note the trustee proceeded to foreclose the deed of trust for the default in payment of the two interest coupons and at the sale the property was bought by said payee the foreclosure was a nullity and a purchaser from said payee, with knowledge of the facts, acquired no title as against the holder of the note and cannot object to a foreclosure of the deed of trust by the legal holder of the note.

Appeal from the District Court of Conejos County.

MR. CHARLES M. CORLETT, for appellants.

MR. IRA J. BLOOMFIELD, for appellee.

WILSON, P. J.

In May, 1891, Lewis F. Crandell negotiated with The Colorado Securities Company a loan of one thousand dollars, for which he gave his note, payable in five years from date, the interest being represented by ten coupon notes attached. At the same time, to secure the payment of this, he executed a deed of trust upon certain lands in Costilla county

to H. J. Aldrich, trustee, who was at the time manager of The Colorado Securities Company, and the holder and owner of all but three of the seven thousand shares of the capital stock of the company, which had been issued. Within about a month afterward, The Colorado Securities Company sold and assigned the note to Samuel Turbutt, of Baltimore, Maryland. Shortly afterwards, Crandell sold and conveyed his interest in the land, subject to the deed of trust, to his wife, Adda G. Crandell, one of the defendants in this suit. The interest for 1891 and 1892 was promptly paid, but default was made as to that evidenced by the two coupons due in 1893. Some time in the latter part of this year, Aldrich, through fraudulent representations, induced Turbutt to send to him, or to the Securities company, these overdue interest coupons for 1893. Soon afterwards, in February, 1894, Aldrich, without the knowledge, consent or request of Turbutt, the owner and holder of the note, advertised the land for sale under the deed of trust, sold it in March, and at the sale the securities company became the purchaser for a consideration of \$25.00. Very shortly subsequent, the securities company becoming insolvent, F. G. Patterson, also a defendant in this suit, was appointed receiver, and to him the company conveyed whatever title it had to the Crandell land by quitclaim deed. In June, 1895, more than a year after the pretended foreclosure, L. H. Cheney, the husband of Mrs. Alice B. Cheney, the principal defendant in this suit, and who had been a general agent of the securities company in the negotiations of loans in the section of the state where the Crandell land was situate, commenced a correspondence with the receiver with a view to the purchase of the land, requesting information in his first letter as to what would buy the land, and as to what condition the property was in as to title. The re-

ceiver answered, notifying Cheney that the trust deed had been foreclosed without the knowledge or consent of the holder of the loan, and that, if the holder should so elect, he could probably go into court and have the foreclosure set aside, adding: "The title now stands in me, and I hold it in trust, subject to the claim of the holder of the loan." This correspondence resulted in the conveyance, October 24, 1895, by the receiver, by quitclaim deed to Mrs. Cheney, the defendant, of all title which vested in the receiver to the Crandell land. In May, 1895, Mr. Turbutt first learned that there had been some kind of a sale of the land at which the securities company was the purchaser. Thereupon he wrote to Mr. Cheney for information, and he answered that "the land had been foreclosed under a second trust deed." Thereafter, the exact time not appearing, however, in the evidence, Mr. Turbutt, learning that this answer was untrue, and obtaining correct information as to the actual state of affairs, repudiated the action of Aldrich, and employed an attorney in Colorado to institute such proceedings as might be necessary to protect his rights. For some reason this attorney did not act for more than two years. In May, 1891, being within three years from Mr. Turbutt's discovery of the fraud, he commenced this suit to have the sale made by Aldrich declared void, and all conveyances made thereunder cancelled of record, and for a foreclosure of his trust deed. Mrs. Cheney, Mrs. Crandell and receiver Patterson were made defendants. The two latter made no appearance. Mrs. Cheney appeared and answered. On the trial, judgment was rendered against her in accordance with the prayer of the complaint, and from this she appeals.

The main and controlling question in this case is conclusively settled by an opinion handed down by our supreme court at its April term of 1901, in a

case wherein Mrs. Crandell and Mrs. Cheney were the parties, and in which the invalidity of the trust deed, and the character of the title which Mrs. Cheney acquired by reason of the quitclaim deed to her from receiver Patterson, were considered and passed upon.—*Cheney v. Crandell*, 28 Colo. 383, 65 Pac. 56. The suit arose in this way. It seems that after the execution to Mrs. Cheney of the quitclaim deed, she entered into a contract with Mrs. Crandell, who was still in possession of the land, whereby, upon the payment of four hundred dollars, she was to convey to the latter her title. Mrs. Crandell made some payment under this agreement, but, learning soon afterwards, as she says, that misrepresentations had been made to her, and that the conveyance by Mrs. Cheney would not give her a complete and clear title by reason of the existence of the deed of trust to Turbutt, she repudiated the contract. Thereupon Mrs. Cheney commenced a suit in ejectment to obtain possession of the land. Mrs. Crandell in her answer set up as one of her defenses substantially all of the facts which we have detailed as arising in the suit at bar, alleging the fraud of Aldrich, the invalidity of the pretended foreclosure sale by him, and the invalidity of the asserted title by Mrs. Cheney derived from the quitclaim deed to her.

Referring to the question of whether Mrs. Cheney was an innocent purchaser for value, and the contention of the plaintiff in this suit that she was not, whatever the evidence might have been as to her knowledge of Aldrich's fraud, because her title was acquired by a quitclaim deed only, the court said: "It is not important here what the rule is in this state, for, entirely aside from this question, the evidence conclusively shows that plaintiff (Mrs. Cheney) had knowledge or was in possession of facts which, if diligently followed up, would have given her

information concerning this fraud. Before she acquired title, negotiations were pending between her and the receiver for the purchase of this property, and in his letters the receiver distinctly informed her husband (who, under the facts of this case, is the agent and representative of plaintiff) that the trust deed still existed as a lien upon this property, and that the pretended sale of the trustee was a fraud. * * * Before she parted with her money and took title, she was in possession of facts which, if they did not of themselves show the fraudulent character of the foreclosure, would, if followed up, have revealed to her the defects in the title which she was buying." Again, referring to the contention on the part of Mrs. Cheney that when Turbutt sent the two unpaid interest coupon notes to Aldrich that he sold and assigned them, and that thereupon either Aldrich or the securities company became the owner thereof, and hence being interested in the debt secured by the deed of trust, had a right to direct a foreclosure, the court said that it was not necessary to determine the question as to whether the owner and holder of any of these coupons was such a holder of the note as that upon his request a valid foreclosure and sale would be made, "for it is incontrovertible that neither Aldrich nor the securities company ever became the owner of either one of the interest coupons for the nonpayment of which the pretended foreclosure was had. He or it wrongfully converted these coupons to his or its own use, in violation of the promise made to the holder of the note from which they were detached. Therefore, as between the holder of the note and the securities company and Aldrich, this pretended foreclosure and sale were voidable at the option of the former." Further, in denying a petition for rehearing, the court said: "We are further of the opinion that, even if they belonged to the securities company, the at-

tempted foreclosure and sale by Aldrich constituted a palpable fraud, which conferred no title either upon the purchaser at the sale, or its grantee, the appellant, both of which took with notice of the unconscionable conduct of Aldrich." The conclusions and views of the supreme court based upon the same material facts also conclusively shown by the evidence in this case, meet with our most hearty approval and complete concurrence, and for the reason that they are equally applicable to and are decisive of this controversy, no further discussion or argument by this court is required.

Under the facts the pretended sale by Aldrich was fraudulent and void, and the plaintiff is clearly entitled to a judgment of foreclosure of the deed of trust given to secure the original note.—*Improvement Co. v. Whitehead*, 25 Colo. 354; *Kenney v. Jefferson Co. Bank et al.*, 12 Colo. App. 24; *Cheney v. Crandell*, *supra*.

Several minor questions were raised, but we do not consider it necessary in the determination of this appeal to pass upon them.

The judgment will be affirmed.

Affirmed.

[No. 2031.]

PARSONS V. PARSONS.

1. Appellate Practice—Assignments of Error—Evidence.

A general assignment of error of the admission of improper evidence and the exclusion of proper evidence that fails to direct the attention of the appellate court to any specific testimony either admitted or excluded cannot be considered.

2. Bills and Notes—Bona Fide Purchaser—Failure of Consideration.

A failure of consideration is no defense to an action on a negotiable promissory note in the hands of one who purchased it before maturity for a valuable consideration and without notice of any equities in favor of the payee.

3. Appellate Practice—Instructions—Harmless Error.

Where the facts are such that the trial court should have directed the verdict that was returned, had he been requested to do so, errors in the instructions given are immaterial, and will not be considered on appeal.

Appeal from the District Court of El Paso County.

Mr. G. Q. RICHMOND, for appellant.

Mr. J. W. SHEAFOR, for appellee.

WILSON, P. J.

Appellee brought this suit to recover on a promissory note executed by defendant to A. A. Parsons, of which he claimed to be the owner and holder by assignment for value. Defendant answered, pleading that the note was assigned after maturity, and also that there was a failure of consideration. The latter defense was based upon the following alleged state of facts set up in the answer. It was charged that at the time when the said note was executed, defendant and the payee were husband and wife, and that the sole and only consideration for the note was that the parties should separate, the husband leaving the premises, and that all marital relations between them should cease; but that, subsequently, in violation of such agreement, and against the protest and consent of defendant, the husband returned to the house occupied by defendant, and remained there, resuming the marital relations. Plaintiff replied, denying on information and belief all matters set up in the answer, and further alleging that the note was executed and delivered in consideration of money previously loaned to the defendant by A. A. Parsons, and that the resumption of marital relations after the alleged separation was by mutual consent of the parties. The case was tried upon these two defenses, which, as stated, were solely questions of fact. The finding of the jury was in favor of the plaintiff, and

it being amply supported by the evidence, cannot be questioned by this court. There was assigned for error, generally, the admission by the court of improper evidence offered by the plaintiff and the exclusion by it of proper and relevant testimony offered by the defendant. These assignments are indefinite, not directing the attention of this court to any specific testimony either excluded or admitted, and hence cannot be considered.—*Fleming v. Daly*, 12 Colo. App. 441.

The evidence was conclusive that the plaintiff was an innocent purchaser for value without notice of any equities in favor of defendant, and that the assignment was before maturity. This being true, under the well-settled rules of commercial law, the plaintiff was entitled to a judgment, regardless of what the evidence may have been as to the alleged agreement between defendant and A. A. Parsons, and the violation of it by him. Had plaintiff at the conclusion of the evidence moved the court to direct the jury to return a verdict in his favor, the motion should have been granted. This being the case, it is immaterial whether some of the instructions given by the court were erroneous in some respects, as claimed by defendant. The verdict was right, and one which the jury might properly have rendered upon the mere direction of the court without any instructions at all.—*Curran v. Rothschild*, 14 Colo. App. 503; *Loveland v. Kearney*, 14 Colo. App. 471.

For these reasons the judgment will be affirmed.

Affirmed.

[No. 2073.]

THE H. B. CLAFLIN COMPANY V. LASS ET AL.

1. Fraudulent Conveyances—Execution Sale—Innocent Purchaser.

Where, at an execution sale, a junior execution creditor purchased the property to protect his junior lien, such sale cannot

be set aside by other creditors as fraudulent without connecting the purchaser with such fraud.

2. Same—Evidence—Harmless Error.

In an action to set aside an execution sale on the ground of fraud, where the evidence wholly failed to connect the purchasers with the fraud, the exclusion of corroborative testimony which tended to prove the fraud on the part of the judgment debtors but did not show any participation therein by the purchaser, was not prejudicial error.

Error to the District Court of Summit County.

MESSRS. ROGERS, CUTHBERT & ELLIS, for plaintiff in error.

MR. PIERPONT FULLER, of counsel.

MR. CHARLES A. WILKIN, for defendants in error George Engle, The Exchange Bank, Edwin Carter and T. M. Hudgins.

GUNTER, J.

This suit by plaintiff in error in its own behalf as a creditor of Lass, Rudowsky & Hudgins, and in behalf of other creditors, is to reach property claimed to have been conveyed to defendants in error, Engle and Carter, to defraud creditors. Judgment below for defendants.

Lass, Rudowsky & Hudgins owned three stores, located respectively at Como, Breckenridge and New Castle. These were attached in suits, First National Bank of Central City against the firm, and Mrs. Rudowsky against the same. These suits merged into judgments and executions were levied upon the stocks. A third suit, same defendant, was that of Engle Brothers Exchange Bank, attachment out of which was levied upon the three stores, the suit merging into judgment. At the sale of the Como and Breckenridge stores, under execution in favor of the First National Bank of Central City, sufficient was realized to satisfy the execution, Carter, as trustee

for Engle, being the purchaser. The New Castle stock was sold under execution on the Engle Brothers Bank judgment, and a sufficient sum realized to satisfy the Rudowsky judgment, and to apply about \$400.00 upon the execution in favor of Engle Brothers Exchange Bank judgment; Carter, as trustee of Engle, being also the purchaser at this sale.

Plaintiff in error cannot successfully assault these sales, upon the ground of fraud charged, without connecting defendants, Carter and Engle, therewith. While there was testimony that Hudgins and Rudowsky, two members of the firm of Lass, Rudowsky & Hudgins, agreed together that a fraudulent sale should be made, yet there is no testimony that either Carter or Engle was ever consulted relative to such sale, or ever agreed to become, or did become, parties to such a sale. In truth, the fraudulent sale which Rudowsky says was planned between him and Hudgins was never made. Two of the stores were offered for sale under the execution in favor of the First National Bank of Central City, Engle Brothers Exchange Bank (being for the purpose of this suit George Engle), a junior execution creditor, through Carter, as trustee, bought, bidding a sufficient sum to satisfy the previous execution lien of above bank. No one testified that the purchase was made with a fraudulent purpose. The circumstances in evidence are consistent with the legal presumption that the purchase was made with honest purpose on the part of Carter and Engle, that is, for the purpose of protecting a junior lien.

The third store, as stated, was purchased by Carter, as trustee, on the execution in favor of Engle Brothers Exchange Bank. No one testified that the purchase was made with other than honest intent. The circumstances here too are consistent with the legal presumption of honesty in this transaction.

As to the testimony excluded, it all went to corroborate Rudowsky upon points not connecting Engle or Carter in any way with the fraudulent scheme alleged to have been concocted between Hudgins and Rudowsky. It did not supply the case in a particular wherein it was fatally defective, that is, a showing of participancy upon the part of defendants, Carter and Engle, in the alleged fraud. It is not necessary therefore to consider whether error was committed in its rejection. The trial court after hearing the evidence found that neither Carter nor Engle was a party to the alleged fraud. We think this finding correct, and that the judgment below was right.

Judgment affirmed.

Affirmed.

[No. 2087.]

THE BOARD OF COUNTY COMMISSIONERS OF YUMA
COUNTY V. PENDLETON.

Fees and Salaries—District Attorneys—Trials Before Justices of the Peace.

The allowance or disallowance of fees of a district attorney for the trial or examination of any criminal case before a justice of the peace is wholly within the discretion of the board of county commissioners, and is not reviewable by the courts, and where the board had disallowed such fees it was error for the district court to allow them and enter judgment therefor against the county.

Appeal from the District Court of Yuma County.

Mr. Jo. A. FOWLER, for appellant.

GUNTER, J.

Appellee sued to recover fees for services as district attorney in criminal trials and examinations before a justice of the peace; his bill therefor had been disallowed by appellant; judgment below was for appellee.

Mills' Ann. Stats., vol. 3, sec. 1905, as to this, a third-class county, provides: "That the county commissioners may in their discretion disallow any charges against the county for fees or costs of district attorneys, or other persons, for the trial or examination of any criminal case before any justice of the peace * * *."

This section was construed in *Board of County Commissioners of Pitkin County v. Sanders*, 27 Colo. 122, 59 Pac. 402, the court saying: "The obvious intent of our act unquestionably was to give to county commissioners, and its true meaning is, that they have the discretion, not reviewable, to disallow the statutory fees and costs of criminal trials and examinations claimed by all persons for whom fees are therein prescribed, and in whose favor costs are taxed * * *."

As the order of appellant disallowing the bill of appellee was not subject to review by the courts, the subsequent allowance thereof by the district court was error.

Judgment reversed.

Reversed.

[No. 2091.]

MATTICE ET AL. AS TRUSTEES OF THE PUEBLO WATER
WORKS V. WILCOXON.

Practice—Appeals from County to District Court—Trial De Novo
—Res Judicata.

Where a cause is appealed from the county court to the district court, the trial in the district court is de novo. Where a plaintiff sued in county court on two counts and was nonsuited as to one and recovered judgment on the other, and defendant appealed to the district court, the judgment of the county court is not res judicata as to the count nonsuited, and plaintiff is entitled to a new trial upon both counts.

Appeal from the District Court of Pueblo County.

Mr. A. W. LENNARD, for appellants.

Mr. JNO. R. DIXON, for appellee.

GUNTER, J.

Appellee sued in the county court, his complaint stating two causes of action. Upon trial he was nonsuited on the first, recovering judgment on the second. An appeal was by present appellants to the district court; there a retrial on both causes of action resulted in a judgment against appellants on the first cause of action and a judgment in their favor on the second.

Appellants objected in the district court to a retrial of the first cause of action, contending that the judgment in the county court nonsuiting appellee on such cause of action was *res adjudicata*.

This is the contention here: The case instituted in the county court and tried here, consisted of two causes of action; this was appealed to the district court. The procedure on appeal was controlled by *Mills' Ann. Stats., vol. 1, sec. 1089*, reading as follows: "In all appeals provided for in the foregoing section, the proceedings in the appellate court shall be, in all respects, *de novo*. Said appellate court shall consider and pass upon all objections to the pleadings and proceedings in the said cause, which may have been made in the county court, and make such orders, and render such judgments or decrees as shall be meet and proper, in the same manner as though such cause had been originally begun in said district court; and the defendant, where judgment has been rendered by default, shall have a right to plead any and all defenses which he might have pleaded had the cause been originally brought in the district court. All such causes shall be conducted in the same manner as if originally brought in the district court."

The court—*Tabor v. Miles*, 5 Colo. App. 128, 38 Pac. 64—in ruling upon this statute, says: “The statute is clear and explicit; no construction is necessary. The language is ‘shall be in all respects *de novo*.’ All proceedings of the court below are vacated, held for naught. Such being the case, nothing was *res adjudicata*, * * *. There was nothing that could be pleaded of proceedings there had that would conclude either party.”

The appeal to the district court entitled appellee herein to a retrial of the case heard by the county court.

As the case heard by the county court was upon the two causes of action, the district court ruled correctly in permitting a retrial upon the two causes of action on appeal. Its judgment is affirmed.

Affirmed.

[No. 2094.]

HARTER V. SHULL.

1. Judgments—Pleading.

In an action upon a judgment a denial of any indebtedness puts nothing in issue.

2. Judgments—Pleading—Payment.

In an action upon a judgment, an answer alleging payment of the obligation upon which the judgment was rendered prior to the recovery of the judgment states no defense to the action.

3. Judgments—Pleading—Fraud.

In an action upon a judgment an answer which alleges that defendant employed an attorney to conduct his defense in the action in which the judgment was rendered, and expected him to introduce in evidence a receipt for the indebtedness sued upon, and to prove the payment thereof by certain named witnesses, and that defendant is informed and believes and upon such information and belief alleges that plaintiffs colluded and conspired with his attorney whereby said attorney did not make any defense and allowed a false and fraudulent judgment to be entered against defendant, is insufficient to charge fraud in procuring the judgment, and states no defense to the action.

4. Judgments—Collateral Attack—Fraud.

In an action upon a judgment a defense that the judgment was procured through fraud is a collateral attack.

5. Judgments—Collateral Attack.

A judgment rendered by a court of competent jurisdiction cannot be collaterally attacked unless it is absolutely void. And the rule applies equally to domestic and foreign judgments.

Appeal from the County Court of Logan County.

Mr. W. L. HAYS, for appellant.

Mr. H. N. HAYNES, for appellees.

THOMSON, J.

The complaint in this cause, filed on the 14th day of December, 1898, alleged that on the 8th day of November, 1897, the appellees recovered judgment against the appellant on a promissory note made by him, in the district court of Sac county, Iowa, which court had full and complete jurisdiction in the cause, and that no part of the judgment had been paid. Judgment was demanded for the amount of the Iowa judgment and costs.

The defendant answered denying that he was indebted to the plaintiffs in any sum; and alleging that the obligation upon which the judgment was recovered had been paid long prior to its recovery, to one Jacob Snell, the agent of the plaintiff, who gave the defendant a receipt for the money. The answer then proceeded as follows:

“That defendant before said 8th day of November, 1897, employed one W. H. Hart, a practicing attorney in Sac City, in said Sac county, to conduct his defense to said fraudulent and pretended suit, and expected him, the said Hart, to introduce said receipt as evidence, and prove the payment of said indebtedness by the said Jacob Snell, who was a convenient witness, who was present when defendant paid said

indebtedness, and was a convenient witness to testify to said fact. That defendant is informed and believes and upon such information and belief alleges that plaintiffs colluded and conspired with said W. H. Hart whereby said Hart was not to, and did not make, any defense to said plaintiffs' false and pretended claim in said suit and allowed a false and fraudulent judgment, if any judgment there be, to be entered against this defendant."

The plaintiffs moved for judgment on the pleadings, on the ground that the allegations of the answer did not constitute a defense to the action. The motion was sustained, and judgment entered for the amount appearing to be due. The rendition of the judgment is assigned for error.

It is not disputed that the Iowa court had jurisdiction of the subject-matter of the suit in which it rendered judgment, and of the person of the defendant; and that it had such jurisdiction, and that the judgment was never reversed, abundantly appears from the pleadings. The denial of indebtedness puts nothing in issue. The statement that the obligation upon which the Iowa judgment was recovered had been paid prior to the recovery of the judgment, is immaterial. It is not the statement of a possible defense to this action. The question of payment might have been litigated in the original suit, but the parties are concluded by the judgment. —*Hallack v. Loft*, 19 Colo. 74; *Gordon v. Johnson*, 3 Colo. App. 139.

Neither do the remaining allegations of the answer show a defense. The defendant says he employed an attorney to conduct his defense to the action brought in Iowa, and that he expected the attorney to introduce Snell's receipt in evidence, and prove the payment by Snell and another witness; but that he is informed and believes, and on information

and belief alleges that the plaintiffs colluded and conspired with his attorney, so that the attorney was not to make, and did not make, any defense to the action, and allowed a fraudulent judgment to be taken against him. Now, even if the original judgment could be attacked by answer in the present suit, a case of fraud or conspiracy is hardly stated in the pleading we are considering. Whether a transaction is fraudulent or not, is a question of law, to be determined upon the facts; and in pleading fraud, the facts from which it is a conclusion, must be set forth, and those facts must warrant the conclusion.

In this answer it is said that the defendant expected his attorney to introduce Snell's receipt, and use Snell and another, as witnesses to prove the payment; but on what the expectation was based, is not stated. It is not alleged that the defendant ever gave the receipt to the attorney, or that the attorney knew of the existence of the receipt, or knew that there were any witnesses to the fact of payment, or even knew that there was a payment. But, if the receipt was given to the attorney, there is no allegation that he did not use it, or that he did not bring the witnesses into court and examine them. That the attorney did his full duty, and obeyed every instruction of the defendant, is entirely consistent with all the allegations of fact contained in the answer. It is true that the defendant says he is informed and believes that, owing to a conspiracy between his attorney and the plaintiffs, no defense was made to the action. No person ought to be held to answer a charge of fraud which is made, not as a fact, but as a conclusion drawn from irresponsible hearsay.—11 Encyclopedia Pleadings and Practice, 1180 bb.

But even the hearsay does not purport to deal with facts. It purports simply that the attorney did

not make a defense. What is meant by that is not divulged. Whether the attorney neglected to file an answer, or, having filed an answer, failed to appear at the trial, or, having appeared at the trial, failed to offer evidence, or, having offered evidence, unnecessarily allowed it to be excluded, or, what the particular acts or omissions of the attorney were, which are supposed to warrant the complaint which is made, the hearsay on which the defendant relies, is silent.

But, conceding to the answer the force and effect intended by the pleader, it is a collateral attack on the Iowa judgment. A judgment regularly rendered cannot be collaterally questioned. In *Cochrane v. Parker*, 12 Colo. App. 169, this court, speaking through Wilson, J., said:

"A collateral attack on a judgment is in its general sense any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree. The fact that the parties are the same and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule or make the attack any the less a collateral one. It is well settled that judgments of a court of competent jurisdiction are not subject to collateral attack, unless they are void, and by void is meant that they are an absolute nullity. In support of this we need refer to no authorities outside of our own state."—See also *Brown v. Tucker*, 7 Colo. 30; *Carpenter v. Oakland*, 30 Calif. 439; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218.

And the rule applies equally to domestic and foreign judgments.—*Burnley v. Stevenson*, 24 Ohio St. 474; *Dunlap v. Byers*, 110 Mich. 109.

The case of *Pearce v. Olney*, 20 Conn. 543, cited as announcing a different doctrine, does not support counsel's contention. That case was a proceeding

by injunction to restrain the further prosecution of an action at law. Olney had recovered a judgment against Pearce in the superior court of the city of New York, and had brought an action on his judgment in Connecticut. It was the further prosecution of this suit that Pearce sought to restrain. The ground on which the relief was prayed, was fraud in the procurement of the judgment. He did not seek to interpose the fraud as a defense to the action on the judgment; nor was his proceeding intended to interfere with the judgment. The injunction he sought could affect the person only. There was no collateral attack upon the judgment, and the court took occasion to affirm the general doctrine that it is not competent to a court of one state to impeach a judgment recovered in another. A similar case is *United States v. Throckmorton*, 98 U. S. 61.

The answer set forth no defense, and judgment was properly given on the pleadings.

Let the judgment be affirmed.

Affirmed.

[No. 2086.]

GIBONS v. THE DENVER BROKERAGE AND CONSTRUCTION COMPANY ET AL.

Practice—Pleading—Amendments—Change of Cause of Action.

An amendment to a complaint which changes the cause of action as stated in the original complaint from an equitable action to a legal one or vice versa, is not permissible.

Appeal from the District Court of Arapahoe County.

Mr. JAMES A. KILTON and Mr. JOHN S. GIBONS,
pro se, for appellant.

Messrs. BENEDICT & PHELPS and Mr. HORACE
PHELPS, for appellee Jorammon.

WILSON, P. J.

It appears from the allegations of the first or original complaint, that one George W. Snell purchased from A. B. Chittenden certain lots in the city of Denver, and about the same time entered into a contract with defendant Joralmon & Company, whereby the latter agreed to loan Snell a certain amount of money for the purpose of erecting certain specified improvements upon these lots, the money to be advanced in installments according to the progress of the work, the whole loan to be secured by a first deed of trust upon the property. This deed of trust was executed, and then a second deed of trust was given to secure the payment of the purchase money to Chittenden. Within a few days thereafter, Snell assigned his interest in this building contract to defendant, The Denver Brokerage and Construction Company, a corporation, of which it seems Frank S. Snell was president and general manager. Within a very few days subsequent to this, the construction company entered into a contract with plaintiff whereby it was agreed that plaintiff was to advance the sum of eight hundred dollars, to be available at once in the erection of the improvements on the lots, for which he was to receive a certain specified compensation, and it was further agreed that the plaintiff should handle and pay out the moneys advanced by Joralmon, and might upon the completion of the improvements deduct therefrom the money advanced by him, the surplus to be paid to the construction company. On the same day the construction company assigned the building contract with Joralmon & Company to plaintiff, and agreed to convey to plaintiff all its equity in the land should it fail to carry out its agreements in the contract with him. Thereafter, plaintiff, it is alleged, advanced to the construction company about a thousand dollars, which was used in the construction of the improvements.

It is further alleged that prior to all these transactions, the defendants knew that said company and Frank S. Snell had no money nor resources, and that all improvements to be made on said land were to be wholly constructed and completed from the moneys to be loaned by Joralmon & Company, and that prior to the signing of the contract between plaintiff and the construction company, its terms were explained to Joralmon & Company, who agreed that the building contract with them might be assigned to plaintiff, and that no money would be paid out by them except on the written order of Frank S. Snell, countersigned by plaintiff. The building contract was recorded, and all improvements mentioned in the contract fully completed. It was further alleged that neither the construction company nor Frank S. Snell had paid to the plaintiff the various moneys advanced by him, and due under the terms of the contract with them. Judgment was prayed against the construction company and Frank S. Snell for the moneys advanced by the plaintiff, and for interest; and a decree was also prayed declaring such judgment a lien upon the land and the improvements prior and superior to the lien of the Chittenden deed of trust, and equal in rank to the Joralmon deed of trust, and that the land and improvements be sold to satisfy such lien and judgment. A decree was also prayed directing Joralmon & Company to pay plaintiff the amount of the judgment.

Without regard to the prayers for judgment and decrees, it is too manifest to require any argument that the complaint stated only an equitable cause of action against Joralmon & Company, if it stated any at all, and that if under its allegations, plaintiff was entitled to any relief against this defendant, it was equitable relief. The complaint alleged no contractual relations between the plaintiff and Joral-

mon & Company, and nothing upon which could be based an action at law against them. A demurrer to the complaint was sustained, and thereupon plaintiff filed an amended complaint. This in its essential features, so far as concerns the character of the action, was the same as the first complaint. A demurrer to this first amended complaint was sustained. Both in the original and in the amended complaint, there were designated as defendants, the construction company, Frank S. Snell, Joralmon & Company, A. B. Chittenden and the trustees in the two deeds of trust which we have mentioned. Demurrer having been sustained to the amended complaint, the plaintiff dismissed as to the trustees in the deeds of trust, and also as to A. B. Chittenden, and thereupon filed a second amended complaint, with the construction company, Frank S. Snell and Joralmon & Company as the sole defendants. A money judgment was prayed against all of the defendants, including Joralmon & Company, and a decree was also prayed directing Joralmon & Company to assign to plaintiff such share in the note originally given by George W. Snell for their loan to him, as the amount of this judgment would be to the whole amount of the said note.

The allegations of the second amended complaint were largely the same as in the other complaints, but in one respect essentially and vitally different. There was set forth an express agreement and obligation on the part of Joralmon & Company to pay to plaintiff the amount of the advances made by him for the building purposes under his contract with the construction company, and hence stated a cause of action at law instead of equity. By reason of this alleged specific promise by Joralmon & Company, plaintiff sought a money judgment against them.

Neither Snell nor the construction company ever made any appearance, and default was taken against

them prior to the filing of the first amended complaint. The action thereafter as pending was solely against Joralmon & Company. Upon the filing of this second amended complaint, Joralmon & Company moved to strike it from the files, "because said so-called amended complaint is not an amendment, and plaintiff therein and thereby attempts to change his cause of action herein, and proceed against different defendants from the defendants originally sued herein." This motion was sustained, and the plaintiff electing to stand on his second amended complaint, judgment was rendered in favor of Joralmon.

We think the court was correct in its ruling. In *Rockwell v. Holcomb*, 3 Colo. App. 1, it was said by this court: "The right to amend a complaint, even after leave granted by the court, is limited to the accurate and correct expression in legal form of a cause of action which has theretofore been inaccurately or insufficiently expressed." The second amended complaint was not limited within the requirements of this rule. It was substantially and in effect the same as the original, and as the first amended complaint, except that portion of it which sought to set forth a cause of action at law against Joralmon & Company. In this respect it was a clear departure, which under the well-settled rules of pleading, was not permissible. A plaintiff may not under the guise of an amendment to a complaint, change the cause of action as stated in the original complaint from a legal to an equitable one, or *vice versa*.—*Givens v. Wheeler*, 6 Colo. 149; *Thompson v. White*, 25 Colo. 226; Bliss, Code Pleading, § 429.

We are aware that under the code practice, the form of prayer is immaterial, and that if the facts alleged and established entitle the plaintiff to relief, the court may give it, although it may not be specifically demanded. We have referred to the prayers

of these several complaints simply for the purpose of showing that according to the theory of the pleader himself, the allegations of the first two complaints stated an equitable cause of action, if any, and also that in the second amended complaint the pleader not only stated a cause of action at law against Joralmon & Company, but so intended to state it.

For the reasons given the judgment will be affirmed. *Affirmed.*

[No. 2092.]

THE TOWN OF COLORADO CITY V. SMITH.

1. Appellate Practice—Verdict—Conflicting Evidence.

A verdict of a jury upon conflicting testimony is conclusive on the appellate court where there is sufficient evidence to support the verdict and it is not manifestly contrary to the weight of the testimony.

2. Negligence—Personal Injuries—Excessive Damage.

In an action against a town for damage for personal injuries, where plaintiff, before the injury, was a strong, healthy woman, earning from \$1 to \$1.50 per day from her work, and by the injury she was rendered unfit to perform her ordinary work and is unable to earn anything, a verdict for \$2,000 will not be held excessive.

3. Practice—Evidence—Objections.

Objections to the admission of evidence without assigning any reasons therefor do not entitle a party to have such objections considered.

4. Evidence—Admissions—Not Prejudicial.

In an action against a town for injuries caused by a defective sidewalk, the admission in evidence of a conversation had with the mayor, wherein he admitted that he had known of the defect for a long while prior to the accident, and had directed it to be repaired, was not prejudicial where the evidence, outside of the conversation, was amply sufficient to charge the town with notice of the defective condition of the sidewalk.

5. Negligence—Cities and Towns—Defective Walks—Notice—Evidence.

In an action against a town for injuries from a fall occasioned by a loose plank in the sidewalk where the evidence located the exact defect that caused the injury, it was then com-

petent, in order to prove notice to defendant, to show that similar defects existed in the immediate vicinity of the place where the accident occurred.

Appeal from the District Court of El Paso County.

Mr. JOHN R. WATT and Mr. JOHN W. SLEEPER,
for appellant.

Mr. GEORGE GARDNER, for appellee.

WILSON, P. J.

Mrs. Smith brought suit against the defendant town to recover ten thousand dollars damages for personal injuries received in consequence of a fall upon a sidewalk, which she claims that the defendant had negligently permitted to become and remain insecure, unsafe and defective. The verdict of the jury was in her favor, damages being assessed at two thousand dollars, and judgment was rendered accordingly. The verdict and judgment are vigorously assailed by counsel in their argument, because it is claimed they were not supported by the evidence and in the same connection for the further reason that the damages awarded were excessive. With reference to the first objection, it need only be said that there was some conflict in the testimony, so far as the question concerned the negligence of the defendant, but it was amply sufficient to support a verdict for plaintiff, indeed, the great weight of the testimony favored such a verdict. In such cases, that the finding of the jury is conclusive upon this court has been so repeatedly held that no citation of authorities is necessary.

There was also some little conflict of evidence as to the character and extent of the injuries suffered by the plaintiff, but by no means sufficient to warrant this court in saying that the damages awarded were excessive. In suits of this character, it is the special

province of the jury to determine the amount of the damages, and nothing is disclosed by the evidence which would justify us in interfering with its prerogative in this case. We do not discover anything which would justify us in holding that the jury was misled, that it acted through bias or prejudice, or that the judgment was exorbitant or disproportioned to the injuries received.—*Wall et al. v. Livezey*, 6 Colo. 465; *City of Denver v. Dunsmore*, 7 Colo. 343. There was testimony to the effect that plaintiff suffered much pain in consequence of her fall; that before the injury she was a strong woman, washed, and kept boarders, earning from \$1.00 to \$1.50 a day; that since such time she had been unable to do such work, or to earn anything, and had been rendered unfit to perform her ordinary duties.

The remaining questions discussed by counsel concern the alleged admission of improper and incompetent evidence. If there was any merit in this contention, the defendant would be precluded from receiving any benefit from it, because in almost every instance, the objection was not properly made. Defendant simply objected, without assigning any reason therefor, and in such case it is not entitled to have the objection considered.—*Hindry v. McPhee*, 11 Colo. App. 401. We do not think, however, there was any weight in the objection to that evidence to which counsel most particularly direct the attention of the court in their argument, and the admission of which, they contend, was most serious error. The testimony as to a conversation with the mayor in which he is said to have admitted that he had known long prior to the accident that the plank which was the occasion of the plaintiff's fall was loose, and had directed it to be repaired, was not prejudicial to the defendant, even if it was improperly admitted. Its object and purport, of course, was to fasten knowl-

edge of the defect upon the city, and the testimony was amply sufficient for this purpose, excluding entirely this conversation. The location of the walk and the great length of time during which it was shown that at the immediate place and vicinity where this accident occurred, it had been in a defective condition, was alone sufficient for this purpose.—*City of Boulder v. Niles*, 9 Colo. 421. Besides, at least two witnesses who had been in the employ of the city and whose special duty it was to look after the sidewalks and streets, testified positively that to their personal knowledge the sidewalk at this point had been for a long time in bad condition, and that it had been impossible to keep it in repair. It seems that it was constructed of wood, and had been down for so many years that stringers and boards had become so rotten that the boards could not be held down by the nails,—at least, such was the testimony of a number of witnesses, and this was ample to charge the town with notice.

Defendant insists that the testimony as to the defective condition of the walk should have been confined strictly to the single plank which was alleged to have occasioned the fall of the plaintiff. We think not, under the circumstances. That the fall was occasioned by a certain loose plank was shown by the testimony of the plaintiff, and of two persons who were with her, and the exact location of this plank was identified. It was then clearly competent in order to show notice to and knowledge by defendant, for plaintiff to further show that the walk was defective and dangerous, and that similar defects existed in that vicinity, the attention of the witnesses being directed, as was invariably done in this case, to the immediate vicinity of the spot where the fall was occasioned. The defendant does not complain of any instructions.

There being in our opinion no reversible error in the admission of any evidence, and the jury having found for the plaintiff upon conflicting but sufficient testimony, the judgment will be affirmed.

Affirmed.

[No. 2077.]

AUSTIN V. SNIDER ET AL.

1. Appeal Bonds—Action Upon—Parties—Several Damage—Injunction Bonds.

Where an appeal bond is made payable to several appellees and any one of the appellees sustains damage through the taking of the appeal, even though such damage is several, such appellee may maintain a several action upon the bond therefor. And the same principle applies to an action upon an injunction bond.

2. Same.

Where an appeal bond and an injunction bond were made payable to plaintiff and two other appellees one of whom was sued only as receiver, and whatever interest the receiver had was held for the benefit of plaintiff, and before action was commenced on the bonds said receiver was by the court discharged, and pending the appeal the other payee in the bonds died, leaving plaintiff his sole heir at law, and no reason existed for the appointment of an administrator for the deceased payee and none was appointed, plaintiff was the only party interested in the recovery of damages upon said bonds and could maintain a several action thereon.

Appeal from the District Court of El Paso County.

Mr. CHAS. F. POTTER and Mr. R. T. McNEAL, for appellant.

Mr. ARTHUR CORNFORTH and Messrs. GUNNELL & HAMLIN, for appellees.

GUNTER, J.

December, 1892, appellant, as devisee of Rose Rinehart, was entitled by the judgment of the district court to the possession, jointly with Geo. W. Snider, of Manitou grand caverns, together with the payment

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of a certain sum from Leddy, receiver, one-half of the proceeds from the exhibition thereof. On said date Snider filed his complaint in said district court against appellant as such devisee, and Charles Rinehart in his own right, and as administrator of said Rose Rinehart, and said Leddy as such receiver, and obtained an injunction restraining appellant and Charles Rinehart from enforcing said judgment, and Leddy from paying over to plaintiff the moneys in his hands as such receiver, which injunction was, December, 1893, dissolved by the decree of said court, and the complaint dismissed at the cost of said Snider. From which judgment he appealed to the supreme court, and executed with other defendants herein an appeal bond payable to appellant and her codefendants in said action conditioned, "If the said George W. Snider shall duly prosecute said appeal and pay the amount of said judgment, costs, interest and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed, or said appeal dismissed, then the above obligation to be null and void, otherwise to remain in full force." The judgment appealed from was affirmed January 7, 1895.

The first cause of action of appellant's complaint herein is upon said appeal bond, wherein it is alleged she was damaged by such appeal in being deprived of the use of the moneys in the hands of the receiver at the time of said appeal, and of moneys which came into his hands pending the same, and that by reason of said appeal she was required to and did pay a certain sum to said receiver for his services and expenses, and that she was further damaged by the failure of Snider to pay certain costs awarded appellant in said district court proceeding, and on the affirmance by the supreme court.

It further appears that pending the appeal in

which the bond sued on was given Charles Rinehart died, leaving appellant his only heir at law; that no administration has been had on his estate; that no debts exist against his estate, and that no debts were proven or ever existed against Rose Rinehart. Pending the appeal to the supreme court said Snider filed a petition therein for an injunction against appellant, Charles Rinehart, and said Leddy, forbidding further proceedings in said cause until said appeal should be determined. Such writ was ordered and bond given by Snider signed by himself and his co-appellees conditioned for the payment of all costs and damages awarded against him in case said injunction should be modified or dissolved.

The second cause of action herein is upon last-mentioned bond, and it is alleged that appellant has sustained damage in being deprived of the use of the funds in the hands of said receiver, and in a sum which she has been compelled to pay, and did pay, said receiver for his services and expenses pending the appeal, and in a further sum expended in employment of counsel to secure a dissolution of the injunction, and for certain other expenses in the nature of costs connected with the appeal.

The present suit was instituted April, 1897; long prior thereto said receiver had been discharged. With the elimination, by death, of Charles Rinehart, and by discharge of the court of receiver Leddy, at the date of the institution of this suit appellant was the only party interested in the recovery of damages upon said bonds.

The above facts appear explicitly from the complaint, except the discharge of receiver Leddy prior to the institution of this action. The general averments of the complaint, aided by the fact that this discharge was at the trial proven without objection,

justify us in considering the discharge as specifically alleged in the complaint.

Appellees contend that the complaint does not state a cause of action in this; that the bonds therein set out showed a joint right of action in favor of the obligees therein, but not a several cause of action in favor of this appellant.

The purpose of the law in exacting the appeal bond sued upon in the first cause of action herein was to secure protection to appellees, and each of them, in the suit in which the appeal bond was given against any damage sustained by them, or any one or more of them, through the taking of the appeal. Such having been the purpose, if any one of such appellees sustained damage through the taking of the appeal, even though such damage was several, such appellee should be permitted to recover upon such bond. At the time of the giving of such bond appellant herein, as devisee and legatee of Rose Rinehart, was the equitable owner of the funds in the hands of the receiver subject to any claims thereon of Charles Rinehart in his personal capacity, and in his capacity as administrator with will annexed of Rose Rinehart. Over three years prior to the institution of this suit Charles Rinehart died; whatever interest, if any, he had held in the bond or the funds in the hands of the receiver had passed to appellant herein. Whatever interest Leddy had when such appeal bond was given in funds in his hands as receiver was as trustee for the beneficial owner, appellant herein. Two years before the institution of this suit Leddy, as receiver, had been discharged. If any damage was sustained through the appeal by preventing the receiver paying over the funds in his hands belonging to appellant such damage was the individual damage of appellant. Any sums paid the receiver for his services and expenses pending the appeal, recoverable on the bond,

constituted damage individual in its character to appellant. The costs in the trial court and the supreme court necessary in the prosecution of the said cause paid by appellant herein were her individual damage. No one other than appellant has any interest in the damages mentioned which she seeks to recover in her second cause of action upon the injunction bond. In suing for such damages in her own name she is the real party in interest which satisfies the requirement of the code. Why should Leddy, over two years discharged as receiver at the time of the institution of this suit, be made a party plaintiff when he has no interest whatever therein? There is no valid reason for any other party plaintiff than appellant. The authorities sustain this conclusion.

Lally v. Wise, 28 Calif. 539, was an action upon an injunction bond. This bond had been given in a suit wherein there were several defendants; the bond ran to these defendants; the suit thereon was by one of such defendants who alone sustained damage through the issuance of the injunction; it was urged that there existed a defect of parties plaintiff. The holding was, that as the plaintiff sustained the damage severally he was the real party in interest and the proper plaintiff.

Alexander et al. v. Jacoby et al., 23 Ohio St. 358, was upon an attachment undertaking. The undertaking had been given by a plaintiff in an attachment suit wherein there were three defendants in their individual capacities; the undertaking ran to such three defendants. Goods owned by two of the defendants as copartners were wrongfully levied upon under the writ; such two copartners in their copartnership capacity sued to recover damages on such undertaking. It was contended that the undertaking was as to the three obligees a joint undertaking and that the action would not lie in favor of such copart-

ners even though the damage sustained had been solely by the copartnership. It was held the action would lie and the court said: "The undertaking is executed to any or all the defendants in the action, at the option of the plaintiff, and not by the consent of the obligees. The order of attachment may be levied upon the separate property of the defendants as well as upon their joint property. It may be dismissed as to some, and enforced against other defendants, and on the final trial of the action, judgment may be given for some and against others. It seems to us, therefore, that as the injury, against which the undertaking was intended to indemnify, may be several as well as joint, that the right of action thereon must also be several as well as joint. And as the general rule of the code is, that, 'every action must be prosecuted in the name of the real party in interest,' we are of the opinion that in actions on such undertakings those obligees, and only those, who have an interest in the damages sought to be recovered, must be joined as plaintiffs or made parties to the suit."

Wason v. Frank, 7 Colo. App. 541, 44 Pac. 378, was upon an injunction bond. Wason toll road company was in the hands of a receiver, Wason. Suit was instituted against the receiver and the company, and an injunction obtained restraining from the collection of tolls pending the action. The undertaking ran to the company, and to Wason as receiver thereof. Wason as receiver sued upon the bond. It was objected that his company should have been joined as a coplaintiff. The court held that as Wason in his capacity as receiver alone sustained damage, he was the real party in interest and the proper party plaintiff. (See also *Pomeroy's Code Remedies*, 3d ed., § 29, p. 282.)—*Fowler v. Frisbie*, 37 Calif. 34; *Hubbard v. Burwell*, 41 Wis. 365.

It would serve no purpose to review the cases

cited by appellees,—the authorities have been examined. In our judgment the appellant was the real party in interest and a cause of action in her favor was stated upon the bond sued on. The same principles apply to the bond sued upon in the second cause of action. The judgment of the trial court that the complaint did not state a cause of action was error.

Judgment reversed.

Reversed.

[No. 2078.]

AUSTIN V. SNIDER ET AL.

Parties—Appeal Bonds—Action Upon.

The obligee in an appeal bond died pending the appeal, and devised her entire estate to plaintiff charged with the support of her husband during his life. The husband was administrator with will annexed. No debts existed against the estate of testatrix. The husband died intestate, without any debts and leaving plaintiff as his only heir. No administrator was appointed for the husband's estate, nor was any one appointed to succeed him as administrator of his wife's estate. Held, not necessary to appoint an administrator to prosecute an action upon the appeal bond, but that such action could be prosecuted by plaintiff in her own name.

Appeal from the District Court of El Paso County.

Mr. CHAS. F. POTTER and Mr. R. T. McNEAL, for appellant.

Mr. ARTHUR CORNFORTH and Messrs. GUNNELL & HAMLIN, for appellees.

GUNTEK, J.

Rose Rinehart sued Snider to recover real estate; had judgment below and on appeal; pending appeal (1890) she died, devising her estate to appellant herein charged with support, during his life, of the husband of decedent, Charles Rinehart. The husband was administrator with will annexed; no debts existed; none were proven against her estate.

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January, 1894, Charles Rinehart died intestate; without estate; without debts; sole heir appellant; no administration upon his estate; no one was appointed to succeed him as administrator of the estate of Rose Rinehart.

This action instituted April, 1897, is by appellant in her personal capacity upon the appeal bond running to Rose Rinehart in *Rinehart v. Snider*, *supra*.

It is contended the complaint alleging the foregoing facts fails to state a cause of action in this: It does not show a right of action in the plaintiff. Appellees insist that only the personal representative can maintain this action.

At the institution of this action appellant was the sole legatee of this bond and of all rights of action thereon. Had administration on the estate of Rose Rinehart then existed the sole interest of the personal representative therein would have been as trustee to discharge the debts of the deceased and distribute the residue to appellant, the sole legatee. If no debts existed the personal representative then would have held as trustee for the sole beneficiary, this appellant. There were no debts. There was no personal representative at such time, Charles Rinehart, the administrator, with will annexed, of Rose Rinehart, having died over three years before without successor in such capacity. At the institution of this action appellant was the sole beneficial owner of the bond and the rights of action thereon. If Charles Rinehart ever had any interest in the bond and the rights of action thereon, they had been eliminated by his death and transferred, as to the beneficial interest, to appellant herein, he, as stated, having died intestate, without estate, without debt, his sole heir appellant. There being no personal representative of Rose Rinehart, there having been no administration on the estate of Charles Rinehart, there being no debts against either

of the deceased parties, this appellant being the sole distributee of each, there were no parties save appellees to question the right of recovery on this bond by appellant and the only interest of appellees as to who is party plaintiff herein is that the judgment rendered may protect them against further liability on the bond. Why require appellant, the real owner of the rights involved in this action, to incur the expense and delay incident to appointing another personal representative of the estate of Rose Rinehart to taking out letters upon the estate of Charles Rinehart, when such representative would have no office to perform except to bring this action and turn the proceeds over, in case of recovery, to appellant? We do not believe the reformed procedure requires this useless and circuitous action. The authorities sustain this conclusion.

“Every action shall be prosecuted in the name of the real party in interest * * * .”—Mills’ Ann. Code, sec. 3; Session Laws 1887, sec. 3, p. 97.

Among the fundamental principles of the code is, “The application to this ‘civil action’ of the familiar equitable rather than legal rules, methods and principles, so far as practicable, and especially in reference to the parties, the pleadings, * * * . It is evident from the most cursory examination of this code that its authors, and presumably the legislature, intended that the various provisions which they introduced in reference to the parties to an action, to the pleadings therein * * * and which were a concise statement of the well settled doctrine of equity relating to these subjects, should apply fully and freely to all actions which might thereafter be brought, and should not be confined to actions that, under the former practice would have been equitable.”—Pomeroy’s Code Remedies, 3d ed., § 28, p. 27.

“Two general and natural principles controlled

its form (the suit in equity): First, that it should be prosecuted by the party really in interest, * * * and, secondly, that all persons whose presence is necessary to a complete determination and settlement of the questions involved shall be made parties, so that in one decree their various rights, claims, interest and liabilities, however varying in importance and extent, may be determined and adjudicated upon by the court."—Pomeroy's Code Remedies, § 112, p. 142.

"It is a well established general rule that heirs, devisees or legatees cannot sue in their own names for the recovery of personal property of a decedent, until after distribution in probate. * * * To this general rule, however, the courts, particularly courts of equity, have recognized various exceptions. Thus, where there is collusion or insolvency on the part of the personal representative, or some special case, the heir has been allowed to sue."—Note to *Hubbard v. Ricard*, 23 Am. Dec. p. 202.

In *McDowell v. Charles*, 6 John. Ch. 132, Chancellor Kent permitted a party entitled to a distributive share of the personal estate to sue the debtor and co-heir to that estate for her proportion of the fund in his possession. In the course of the opinion he said: "The plaintiff and the defendant are the only persons interested in the fund, and the husband of the plaintiff once obtained letters of administration upon the estate of Mary Charles, but those letters were revoked by the procurement of the defendant, and none others have since been granted. It is to be presumed, from the facts charged in the bill, and admitted by the demurrer, that no person has administered upon the estate, and that there are no creditors of the estate, nor any other person but the plaintiff entitled to call defendant to account. The case warrants the inference that the defendant does not wish or intend to account to any human being for the debt

which he owes the estate. If the plaintiff cannot sue, there is no person to call the defendant to account, and the plaintiff is to lose her whole share of the fund. It is a peculiar case, and one in which, taking the facts in the bill to be true, the plaintiff ought to be permitted to sue, and if we examine the adjudged cases on this point, we shall appear to be well authorized to consider this case as one of several exceptions to the general rule."

In *Wood et ux. v. Ford*, 29 Miss. p. 57, the complainant, as one of the distributees of the estate of his deceased father, sued his mother, codistributee, and her second husband for distribution. It was contended that distribution could not be made without the appointment of an administrator. The court said: "As a general rule it is undoubtedly true that distribution must be made by the probate court, and through the medium of an administrator or executor. Yet there are cases in which a court of chancery will exercise the jurisdiction. One of these cases is where no administration has been granted in this state. In such case, it is settled by this court that a court of chancery has jurisdiction to decree a division of the property and an account for hire, and that the distributee is not compelled to take out letters of administration * * *. It appears in this case that the estate of the intestate had been finally settled and all its debts discharged, and that there was no longer an administrator. Nothing remained to be done but to distribute the property and assets among the parties entitled. To compel a distributee to take out letters of administration, execute bond, incur all the expense and trouble, and submit to all the delay incident to a regular administration and settlement of the estate, would under such circumstances be a most useless and unreasonable requirement."

In note to *Hubbard v. Ricard*, *supra*, it is said:

“And it is held that where there are no debts, where those interested in the estate, being of full age and capable of acting for themselves, have agreed among themselves to distribute the estate without administration, and there is no unfairness or fraud, such distribution is good and effectual, and no further administration is necessary.”

The equitable rule recognizing exceptions to the above common-law rule has been liberally construed under the code. In *Patton v. Gregory*, 21 Tex. 513, the court said: “The old rule that heirs cannot sue unless there be collusion or insolvency on the part of the executor, or some special cause, should be liberally construed under our system which subjects not only personal but also real property of an estate to administration.”

Magel v. Milligan, 150 Ind. 582, 65 Am. St. Reports 382, was an action by heirs upon notes given to their ancestor. It appeared that the estate was without debt, and there was no administrator. The court sustained the action and said: “Where, as in this case, an action is brought by heirs to recover a debt due an ancestor, it is necessary to allege and prove that the debts of the ancestor have been paid, and the estate settled, or that no letters of administration have been granted. The reason for this rule is a very sound one. So long as there is an administrator, he is entitled to recover all debts due the estate; besides the heirs can have no right to sue for and recover debts due the estate when such amounts may be needed to make payment to the creditors of the estate. The claims of creditors are paramount to the rights of heirs.”

In *Finnigan v. Finnigan*, 125 Ind. 264, the court said: “The general rule is that an administrator or executor alone can maintain an action for the recovery of the personal property of a deceased person, or

for the recovery of a debt due to his estate at the time of his death. That rule prevails in this state with the single exception that where there is no administrator or executor to prosecute the action, and no debts to be paid by the estate, the heirs may prosecute the action." See also *Regien v. Freeman*, 75 Ind. 398.

In *Hyde v. Stone*, 7 Wendell 354, an action at the common law was sustained wherein the heir sued to recover value for certain personal property inherited and appropriated by a third party. It appeared there had been no administration and no debts.

In *Cross v. Carey*, 25 Ill. 461, it is held that upon the grant of administration that the legal title to personal property of an intestate vests in the representative of the estate in trust for the heirs, distributees and creditors, but the equitable title vests in the heir subject to the payment of the debts immediately upon the death of the ancestor. It was further therein held that the heir could sell the personal estate and pass title, although no letters of administration had issued, provided there were no debts.

As this action under the authorities will lie, it will constitute a plea in bar to further liability of appellees on the bond involved.

See in addition to above authorities, *Wilkins v. Ellett, Adm.*, 108 U. S. 256.

In support of appellees' contention is cited *McKee v. Howe*, 17 Colo. 538, 31 Pac. 113. An administrator sued to remove a cloud from title to certain real estate belonging to his intestate. The court held that the real estate descended to the heir, and that in the absence of an averment that the decedent's estate was insolvent, or that it was necessary to sell or dispose of real estate to pay debts, or that there were any debts against the decedent's estate the administrator had no interest whatever in the cause of action, and that the complaint did not state a cause of

action as to him. That the administrator had no interest in the cause of action was decisive of the case. The court in the course of the opinion suggestively observes: "In some states having statutes regulating the authority of the administrator over the real estate of the decedent similar to ours, it is held that the administrator may maintain an action to set aside a fraudulent conveyance of the decedent's real estate, for the purpose of subjecting such real estate to the payment of debts; but the administrator must in substance aver and prove that there are debts against the estate, and that the real estate which he thus seeks to recover is necessary and liable to the payment of such debts."

In *Hall v. Cowle's Estate*, 15 Colo. 347, 25 Pac. 705, also cited by appellees, the court in the course of its opinion, said: "If the mother * * * living had an enforceable claim against William or his estate, the right, or any portion of it, did not descend to the heir at law, Helen S. Hall. Upon the death of the mother, whatever of property right she may have had in it went to her legal representative, whoever that might be; and only in his right of representation could he sue for and collect it."

This statement of the law was correct as applied to the facts in that case, and is not in conflict with the conclusions we have reached herein. Numerous other authorities are cited by appellees. It would serve no useful purpose to review them in detail. No one of them is upon facts substantially the same as here presented. Some of them announce principles perhaps in conflict with conclusions we have reached herein. Our conclusions, however, are sustained by abundant authority, and are in harmony with code procedure. Appellant was the real party in interest in this action,

the complaint stated a cause of action in her. The lower court, in ruling differently, erred.

Judgment reversed.

Reversed.

[No. 2079.]

AUSTIN V. SNIDER ET AL.

Appeal from the District Court of El Paso County.

Mr. CHAS. F. POTTER and Mr. R. T. McNEAL, for appellant.

Mr. ARTHUR CORNFORTH and Messrs. GUNNELL & HAMLIN, for appellees.

GUNTER, J.

This case was argued with No. 2077, *ante*, page 176, and so far as material to this ruling involves the same questions. For reasons there given the judgment is reversed.

Reversed.

[No. 2090.]

THE CITY OF DENVER ET AL. V. THE PEOPLE EX REL. BURNETT.

Parties—Mandamus—Cities and Towns.

Where the fire and police board of the city of Denver, by resolution which was duly recorded, appointed plaintiff a patrolman, and afterwards his name was erased from the record and another substituted, in an action of mandamus by plaintiff against the city and the fire and police board to compel the restoration of the record of the resolution of his appointment, the person whose name was substituted in the record was not a necessary or proper party to the proceeding.

Appeal from the District Court of Arapahoe County.

Mr. J. M. ELLIS and Mr. N. B. BACHTTELL, for appellants.

Mr. JAMES H. BROWN and Mr. ANDREW W. GILLETTE, for appellee.

GUNTER, J.

So far as material to this ruling the complaint alleges the appointment of M. M. Burnett as patrolman by the fire and police board, said city, evidenced by recorded resolution; that thereafter his initials were erased from the resolution and the record made to read the appointment of E. J. Burnett; that appellee demanded the restoration of the record; this the board denied. Mandamus below resulted in a finding of the issues for appellee, and in an order that the record be restored.

Appellants urge as ground for reversal, that the evidence below was insufficient to show the appointment of M. M. Burnett.

It would avail nothing to discuss in detail the evidence; it suffices to say, that an examination of it is convincing that the vote on the question of appointment was taken upon petitioner M. M. Burnett, not E. J. Burnett, and that he, M. M. Burnett was by resolution appointed patrolman, and the resolution so originally recorded, but that the record was afterwards mutilated by erasing the initials "M. M." and substituting the initials "E. J." therefor. Further, such was the finding of the trial court. This finding was on conflicting evidence and by it we are concluded. E. J. Burnett was not a necessary or proper party to this proceeding.—*Farrall v. King*, 41 Conn. 448.

Judgment affirmed.

Affirmed.

[No. 2042.]

**CLIFTON W. WALTERS V. THE DENVER CONSOLIDATED
ELECTRIC LIGHT COMPANY.****LEVINA E. WALTERS V. THE DENVER CONSOLIDATED
ELECTRIC LIGHT COMPANY.****1. Negligence—Prima Facie Case—Evidence.**

In an action against an electric light company where the evidence shows that its wires were attached to the residence of plaintiff's father about fourteen inches beneath a window where the insulators and transformer were situated; that plaintiff, a boy of twelve years of age, seeing one of the insulators off the bracket, reached down and replaced it and in doing so received a shock and was injured; that at the time of the accident the wire for the distance of one and one-half inches was uninsulated and exposed, the facts establish a prima facie case of negligence against the defendant.

2. Contributory Negligence—Question for Jury.

In an action against an electric light company, the question as to whether plaintiff, a twelve-year-old boy, was guilty of contributory negligence in attempting to replace an insulator on its bracket, is one for the jury to determine.

3. Negligence—Electric Wires—Location—Instructions.

In an action against an electric light company, where the negligence alleged was that defendant permitted its wires to be uninsulated and exposed, and the evidence showed that the wires were attached to the residence of plaintiff's father beneath and within easy reach of a window, at which point the injury occurred, an instruction which told the jury that the only matter they could consider was whether or not defendant was negligent in the condition of the wire, and that they could not consider the question of negligence in placing the wire at the place where it was fastened to the wall, was erroneous. The location of the wire was a material factor in determining the degree of care to be exercised in maintaining it in a reasonably safe condition.

4. Negligence—Instructions.

In an action against an electric light company by a boy twelve years old for injuries caused by coming in contact with an uninsulated wire placed on his father's residence within reach of a window, an instruction that absolved defendant from liability for the condition of the wire, except as to persons having some duty or business to perform at the point where the wire was exposed, was erroneous.

Appeal from the District Court of Arapahoe County.

Mr. R. T. McNEAL and Messrs. WELLS & TAYLOR,
for appellants.

Messrs. WOLCOTT & VAILE and Mr. WILLIAM W.
FIELD, for appellee.

GUNTER, J.

Verdict was for defendant, and from the judgment thereon is this appeal. At a former trial defendant objected to the introduction of testimony upon the ground that the complaint herein did not state facts sufficient to constitute a cause of action. This objection was sustained and judgment of dismissal entered. This was reversed.—*Walters v. Electric Light Company*, 12 Colo. App. 145, 54 Pac. 960. The pleadings herein are the same as on the former appeal.

1. The wires of defendant used in illuminating the residence of plaintiff's father ran to insulators "A" and "B" on iron brackets affixed to the rear wall of the residence; thence to a transformer; thence into the residence. The transformer and insulators were situate about 14 inches beneath the bathroom window. At a point on the main wire just before it reached insulator "A" a union was made between the main wire and the wire leading to the transformer, and to effect this the original insulation was removed from the main wire and transformer wire at the point of union. After the wires were spliced at this point they were soldered together, and to reinsulate them insulating tape should have been wrapped around the point of union. There was evidence from which it might be reasonably concluded that at this point for the distance of about one and one-half inches the wire was exposed at the time of the accident and about two inches of insulating tape unwound and hanging

down. Plaintiff, aged between 12 and 13 years, looked out of the bathroom window about 6.30 in the morning, and seeing glass insulator "A" off the bracket, reached down, took hold of, and replaced it. As he did so a shock was received, producing the injuries, damages for which are sought to be recovered herein. Immediately thereafter he was found unconscious, his hand upon, or close to, the uninsulated section of the wire mentioned. There was evidence sufficient to go to the jury that a section of the wire was uninsulated at the time of the accident; that thereby plaintiff sustained the injuries complained of.

If the jury believed these facts, it made a presumptive case of negligence against defendant. In *The Denver Consolidated Electric Light Company v. Simpson*, 21 Colo. 371, 41 Pac. 499, plaintiff was traveling a public alley; he came in contact with one of defendant's wires charged with electricity, which wire had become detached from its overhead fastening and was hanging to within about two feet of the ground. As result of such contact plaintiff received a severe shock and was seriously injured. He had judgment below. The court, speaking to an alleged error of the trial court in instructing upon what constituted *prima facie* negligence, said: "In substance, the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had become disconnected or detached from its fastenings and hung down in a public alley so as to endanger public travel, that, of itself, was *prima facie* evidence of negligence on the part of defendant. Strictly speaking, except in some relations springing out of contract, the mere happening of an accident is not any evidence of negligence.—Thompson on Carriers of Passengers, v. 209, § 9. But in some cases of tort, it has been held

that the existence of certain facts, unexplained, is some evidence of negligence. *Thomas v. Western Union Tel. Co.*, 100 Mass. 156, and *Haynes v. Gas Company*, 114 N. C. 203, are cases in point, and are authority for the instruction given in this case."

In *Haynes v. Gas Company*, *supra*, a boy aged about 10 years took hold of a wire on the sidewalk over which he was passing and was killed by an electric current. *Inter alia*, the court said: "Proof that there was a 'live' wire (carrying a deadly current) down into the highway surely raises presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant and was its property, and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this 'live' wire was in the street through no fault of its servants and agents."

In *Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269, the court said: "The fact being established that injuries were caused by electricity, and that the car was so charged with the fluid as to injure a person by contact with any part of it, if not establishing negligence *per se*, made such a *prima facie* case as to require defense, either to show that the injuries were not caused by that agency or through the careless use of the agent." See also *Trenton Passenger Railway Company v. Cooper*, 60 New Jersey Law Reports 219.

2. It is contended that the evidence disclosed such contributory negligence as to bar a recovery. The complaint stated the facts fully and distinctly. There was evidence to support its allegations. The

court's holding in *Walters v. Electric Light Company, supra*, that the complaint stated a cause of action, and that the question of contributory negligence should have been submitted to the jury, in effect decided this contention. It is there said: "The question of negligence is a mixed one of law and fact, and, except in rare cases, its determination belongs to the jury. * * * Where, upon facts in its possession, the character of the conduct is in any degree involved in doubt, it is never proper for the court to withdraw the question of negligence from the jury. * * * He (plaintiff) was rightfully in his father's house, and he was rightfully at the window. Seeing something out of place which was attached to the house, directly under the window, and within his reach, it might very naturally occur to him to replace it, and his act in so doing, if he had no knowledge of the purpose of the attachment, and no reason to apprehend danger from it, could hardly be called recklessness."

3. As it was the plaintiff's right to have his case submitted to the jury; it was also his right to have this done under proper instructions. The gist of the charge of plaintiff was, that defendant, through negligence, permitted the wire in question to be in an uninsulated condition. It was for the jury to determine whether or not the wire was uninsulated at the time of the accident, and if so uninsulated, whether the defendant was guilty of negligence in permitting such condition. A material factor in determining the degree of care which defendant should bestow by proper inspection and otherwise in maintaining the wire in a reasonably safe condition was the location of the wire in question. If located at a point readily accessible, the law would require greater care of defendant to preserve the wire insu-

lated than if the wire was located at an inaccessible point.

In *Walters v. Electric Light Co.*, *supra*, it is said: "We may concede that at places where there is no apparent possibility of injury ensuing from electric wires it would not be negligence to leave them uncovered, and that no duty to keep them insulated would exist unless it was imposed by some express law. But by this concession, the question whether, consistently with the degree of care exacted in the management of an agency so dangerous as electricity, it was or was not the duty of defendant to have its wires insulated at the particular place where this injury occurred, is by no means disposed of. * * * The insulator was a harmless looking object; there was nothing to give notice of the deadly force hidden in the wire; the accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly affixed, and in which there were children, or persons ignorant of the purpose of the appliances, or the nature of the electric fluid; * * *."

A part of instruction No. 8 was: "And the court instructs the jury that the only matter which can be considered by the jury as bearing upon the question as to whether or not the defendant was negligent, is the condition of the wire with which Clifton Wood Walters came in contact, and the condition of the insulation upon that wire at the time Clifton Wood Walters was injured."

A part of instruction No. 9 was: "And although you may believe, from the evidence, that the defendant was negligent in placing these wires and transformer or converter at the place where they were fastened to the walls of the house; * * * still such negligence, if any there was, cannot be con-

sidered by you in this case, and must not influence your verdict in any manner whatever.”

The effect of these two instructions was to tell the jury that it could not consider the location of the transformer in determining the degree of care that should be exercised in preserving the wire in question uninsulated. As stated, the location was a material factor in determining the degree of care to be exercised by defendant in maintaining the wire in question in a reasonably safe condition, and for such purpose it should have been considered by the jury. The giving of these two instructions, we think, constitute reversible error.

Instruction No. 18 in effect told the jury to find the issues for defendant. Such instruction is: “The court instructs the jury that if they believe from the evidence that the defendant knew or ought to have known that the insulation upon the wire in question was defective and out of repair, still, the plaintiff cannot recover in this case unless you further believe from the evidence that under all the circumstances proven in this case the defendant, exercising reasonable care, would have or ought to have anticipated that some person might have some duty or business to perform at the point where the insulation upon the wire was defective during the night and before the hour in the morning when the electricity was turned off from the wires in question, and might, while exercising ordinary care to prevent injury to himself, and while performing such duty and business, come in contact with such wire.” This instruction absolved the defendant from all care as to the uninsulated wire except as to persons having some duty or business to perform at the exposed point. It was not claimed that the plaintiff (a child) had any duty or business to perform at such point. The jury, obeying the charge, could not do otherwise than find for

defendant. Such instruction is not the law. "The accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly affixed, and in which there were children, * * * and we cannot say, as a matter of law, that proof would not be admissible under the averments of the complaint, which would justify a verdict that, in leaving the wire exposed as alleged, the defendant was guilty of negligence."—*Walters v. Electric Light Company, supra*.

The defendant owed to this plaintiff the duty of exercising reasonable care under all the circumstances to have and to maintain this wire in a reasonably safe condition. If it failed in this duty, and the plaintiff was free of contributory negligence, liability attached.

There is no sufficient reason for prolonging this opinion to consider the many other errors assigned. The questions thereby presented will probably not arise on a second trial, if one be had. There was sufficient evidence of defendant's negligence for the question to go to the jury. The degree of care exacted of the defendant in operating its plant is settled. "The highest degree of care which skill and foresight can attain consistent with the practical conduct of its business under the known methods and the present state of the particular art."—*Denver Electric Light Co. v. Simpson, supra; Tramway Co. v. Reid, supra*.

The question of contributory negligence upon the facts herein should go to the jury. This, in effect, was also ruled upon the former appeal. These two questions of negligence, and contributory negligence, should have gone to the jury under proper instructions. They were not so submitted.

4. The ruling herein disposes also of *Levina E.*

Walters v. The Denver Consolidated Electric Light Company, as it is controlled by the same facts, and submitted upon the same abstract and briefs.

Cases reversed.

Reversed.

17	200
18	246

17	200
1388	412

[No. 2074.]

ISRAEL, U. S. MARSHAL, v. DAY.

1. Replevin—Pleading—Evidence—Statute of Frauds.

In an action of replevin to recover property from an officer taken under an execution where plaintiff claims the property by purchase from the execution defendant, the defense that the sale to plaintiff was void because not followed by an immediate and continuous change of possession is admissible under a general denial of plaintiff's title, and it is not necessary that such defense be specially pleaded.

2. Replevin—Sales—Statute of Frauds—Instructions.

In an action of replevin to recover property from an officer taken under execution where plaintiff claimed to have purchased the property from the execution debtor and defendant claimed that the sale to plaintiff was void because not followed by an immediate delivery and continuous change of possession, an instruction which told the jury that the controlling question was whether or not the property at the time it was taken under execution was owned by and in the possession of plaintiff or the execution debtor, and that if the property was that of plaintiff their verdict should be for plaintiff, was erroneous and misleading, because it failed to distinguish between a title good as between the parties to the sale and one good as against the creditors of the seller.

3. Replevin—Sales—Change of Possession—Instructions.

In a contest of the title to personal property as between a purchaser and the creditors of the seller, an instruction, that, to make the sale valid as against creditors of the seller, the change of possession must be open, notorious and visible, but that "to constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another if the buyer does such acts as make visible signs of his ownership and maintains that relation to the property purchased which owners of property generally sustain to their own property," is erroneous in failing to require the sale to be accompanied by immediate delivery, and the change of

possession required by the instruction is not such actual change as is required by the statute. The instruction is also defective in failing to explain in what cases removal of the property is not required, and in failing to define what acts of ownership would be sufficient.

Error to the District Court of Weld County.

Messrs. WOLCOTT & VAILE and Mr. WILLIAM W. FIELD, for plaintiff in error.

Mr. H. N. HAYNES, for defendant in error.

THOMSON, J.

Replevin by defendant in error against plaintiff in error. Plaintiff had judgment, and defendant brings the case here by writ of error.

The complaint alleged that on the 10th day of February, 1897, the plaintiff was the owner and lawfully possessed of certain specified goods and chattels of the value of \$900, and that on that day the defendant wrongfully took them from his possession. The answer denied the plaintiff's ownership or possession of the property, or the alleged wrongful taking by the defendant, and averred that on the 13th day of July, 1896, The Farmers' National Bank of Frankfort, Indiana, recovered a judgment in the circuit court of the United States against one J. B. Hindry for \$5,473.33; that on the 27th day of January, 1897, the judgment being unsatisfied, a writ of execution was issued thereon, directed to the defendant as marshal of the district of Colorado, and commanding him as such marshal to make the amount of such judgment, interest and costs, which writ the defendant; on the 10th day of February, 1897, levied on the property in suit as the property of Hindry; and that, at the time of the levy, Hindry was, and long prior thereto had been, the owner of the property. The replication denied ownership in Hindry.

The following is the testimony of the plaintiff: The ranch of Hindry and that of the plaintiff were adjacent. They were separated by the Platte river. That river was the southern boundary of the plaintiff's ranch, and the northern boundary of Hindry's. There was a bridge across the river between the two ranches. The plaintiff bought the property in question in the latter part of January, 1897, for \$540, and on that day received a bill of sale for it. At the time of the purchase, the property was on Hindry's ranch. At that time Hindry told the plaintiff that, as long as he had anything to do with the ranch, he wished the plaintiff to take charge of it. The plaintiff regarded himself as at liberty to take charge of it at once, and used the pasture and buildings. He immediately turned in some stock—both horses and cattle, in the neighborhood of one hundred in all—and had hay from Hindry's ranch fed to all of the stock together—those purchased from Hindry, and those turned in by him. He took control of the ranch, and the personal property on it, and directed the feeding of the stock. The plaintiff gave Hindry his note for the purchase price. The note and bill of sale were both dated August 1, 1896. They were dated back, because the plaintiff had had a stallion of Hindry's from the date of the bill of sale, and he preferred paying interest on the note to paying for the services of the stallion. Four or five head of mules purchased by him were taken over to his own ranch and worked, but afterwards were returned to the Hindry ranch for their care and keep. Hindry's business was that of contractor on ditches and railroad grades. His business required the use of heavy teams and scrapers. The levy was made about two weeks after plaintiff's purchase. Shortly before the levy, Hindry left for Nebraska with some of the horses. He talked about a contract there. At the time of the plaintiff's pur-

chase, a man named Henry was on the Hindry ranch in charge of the property. He had been in Hindry's employ continuously for a good many years. Plaintiff told him of the purchase of the Hindry stock, and instructed him how to handle it, and also instructed him to feed all the stock from the Hindry hay then stacked on the ranch. He did not hire Mr. Henry, or anybody. At Hindry's request he paid money to Henry on account of his indebtedness to Hindry; but, on his own account, he never hired Henry, or paid him wages. Plaintiff made no change in location of the tools and machinery he purchased, and did not move the hay except as it was fed to the stock. He visited the ranch daily, generally in the morning, and sometimes in the afternoon. Hindry had owned his ranch during all the time plaintiff had lived on his, which was about ten years. Hindry was not accustomed to living on his ranch much of the time.

From the other evidence adduced by the plaintiff it appeared that after the transaction between Hindry and the plaintiff, the former left the ranch with a carload of horses, and a general grading outfit; that the officer making the levy was informed at the time that the plaintiff claimed the property, and claimed to have a bill of sale for it; that after the purchase, some of the Hindry horses were taken by the plaintiff over to his own place; that Henry kept on feeding the Hindry horses the same as ever, but fed the plaintiff's stock too; that the stallion was kept all the time in the same place, and the Hindry horses kept separate from the plaintiff's horses, remaining in the same corral they occupied before, and that the machinery and tools remained where they had always been. Mr. Craig, an employee of the plaintiff on his own ranch, was asked this question: "Was it generally known in the community that Mr.

Day had bought the Hindry property?" To which he made answer, "It was known."

The plaintiff, as evidence of his title, introduced the bill of sale executed to him by Hindry at the time of the transaction between them, although antedated. It hardly supports his claim. It recites a consideration of \$540—the exact sum testified to by the plaintiff—but, otherwise, it differs from his statements in his affidavit. By that paper he claims ownership of twenty-seven head of horses, brood mares and colts; whereas the bill of sale purports to transfer to him nineteen head of mares and colts, and no horses. He therefore claims eight animals more than, according to his bill of sale, he bought. Again, the bill of sale gives him one mowing machine, but he sued for three; and he wants seventy-five tons of alfalfa hay, when his written title gives him the right to forty, and no more. Finally, in the list set forth in his affidavit, is included one lot of blacksmith tools; but, referring to his bill of sale, we find that he bought no blacksmith tools at all. That instrument was his own evidence. He introduced it to prove his purchase, and he is bound by it. According to it, he paid \$540 for the articles it enumerates; and, according to his testimony, he paid the same sum for all the articles to which he lays claim. The paper and the testimony can be reconciled only on the supposition that Hindry was so anxious to give the plaintiff good measure, that he threw in eight horses, two mowing machines, thirty-five tons of alfalfa hay, and all his blacksmith tools, without extra charge. If a different line of defense from that relied on had been chosen, the discrepancy between the statement of the transaction, written at the time, and the affidavit and testimony of the plaintiff, might suggest questions which he would experience some difficulty in answering.

However, the sole defense sought to be inter-

posed is that, as against creditors of the vendor, there was no sale, because there was no such immediate delivery, followed by such actual and continued change of possession as would satisfy the requirements of the statute of frauds. The plaintiff argues that such defense is not available to this defendant, for the reason that he did not plead it in his answer. Outside of the justification, the answer was simply a denial of the title alleged by the plaintiff. In support of his contention the plaintiff has referred us to a number of Colorado cases, holding, in conformity with the general current of authority, that if the defendant relies on the fraudulent conduct of the plaintiff to defeat the latter's claim, or establish his own title, the facts constituting the supposed fraud must be set forth in his answer. "Fraud, as a defense," says Mr. Bliss, "is sustained by affirmative facts which do not contradict, but avoid, the legal effect of the facts stated by the plaintiff."—Bliss on Code Pleading, § 329. The rule is thus stated by Mr. Justice Elliott, in *De Votie v. McGerr*, 15 Colo. 467: "Where the defendant's claim of title springs out of, or rests upon, the alleged fraud or fraudulent conduct of the plaintiff, so that but for the fraud, the title of the plaintiff would be good, such fraud, being the source and foundation of the defendant's claim, is essentially new matter, and must be pleaded or it cannot be proved." If, for example, in this case, all the requirements of the statute as to the delivery and change of possession had been complied with, but the defendant sought to overthrow the sale on the ground that it was made with the intent to defraud creditors of the vendor, justice, as well as the rule, would require that the vendee be advised of the charge, and given an opportunity to meet it, and that the fraud should not be proved unless it was pleaded. Proof by the plaintiff of the purchase, and of the de-

livery and change of possession rendered necessary by the statute, would have made a *prima facie* case; and actual fraud infecting the transaction, would be matter of affirmative defense.

The case at bar presents no such situation. Where title is the result of a concurrence of certain facts, the facts must be proved to establish the title. The allegation of title involves the allegation of the facts, and a denial of the title includes a denial of the facts. To prove the title, the plaintiff must prove the existence of the facts on which it depends; and if, under a naked allegation of title, he may prove those facts, then the defendant, under a naked denial of title, may disprove them. Evidence of those facts establishes the title, and contradiction of those facts overthrows it. This plaintiff, in order to maintain his title as against the defendant, undertook to show, first, the purchase from Hindry; second, the immediate delivery of the property to him, and, third, its continued possession in him afterwards. If he established the facts of purchase, delivery and possession, he proved his title; if he failed in proof of either of those facts, he failed in proof of his title; but if his evidence made a *prima facie* case in his favor, the defendant had, under his general denial, the right to show its falsity.—*Andrews v. Bond*, 16 Barb. 633; *Kennedy v. Shaw*, 38 Ind. 474; *Aultman v. Stitchler*, 21 Neb. 72; *Nudd v. Thompson*, 34 Calif. 39; *Young v. Glascock*, 79 Mo. 344.

In a suit between the immediate parties, on a contract for the sale of personal property, if the defendant claims exemption from liability on the ground that the price for which the property was sold was more than fifty dollars, and that there was no memorandum of the sale in writing, and no acceptance or receipt of any part of the goods by the buyer, there is no hardship in exacting from him a special answer

of the facts which bring the contract within the statute of frauds, because they are within his personal knowledge; but, in an action of replevin, where the complaint contains only a general allegation of title, and furnishes no hint as to what the proof will be, to require the defendant,—a stranger to the transaction on which the plaintiff, at the trial, will base his claim,—in order that he may make a special defense, to guess the facts which would invalidate the title, and, at his peril, to guess them right, would, if not always, at least in many instances, work grave injustice.

There is no decision in this state which requires a defendant in replevin to plead the statute of frauds; and we have been referred to but one from the outside, in which counsel's contention finds any support. The case of *Bickle v. Irvine*, 9 Mont. 251, was replevin. The complaint, as in the case at bar, alleged simply that the plaintiff was the owner and entitled to the possession of the property. The answer, like the one here, denied the allegation, and justified under a writ of attachment issued to the defendant, as sheriff. The defendant offered to show by the cross-examination of the plaintiff's vendor, that after the sale by him to the plaintiff, he (the vendor) remained in "continuous and open possession and control of the property." The court, after saying that the transcript was imperfect and failed to show the direct testimony of the witness, proceeded to decide, as an abstract proposition, that the proposed evidence could not be introduced under a general denial. Of course, we do not know what the ruling would have been if the transcript had been perfect; but in so far as the opinion holds that in that case a special plea of the statute of frauds was necessary, it receives no countenance from a single one of the cases cited in its support, and the reasoning in one (*Feeney v. Howard*, 79 Calif. 525) is in diametric op-

position to it. So far as we know, it stands alone. It has neither principle nor authority in its favor, and we must decline to regard the decision as a precedent.

Whether, upon the whole evidence, there was such compliance with the statute as to constitute a sale good against creditors, may well be doubted. For the defendant, the question was raised below, and it is raised here; but, inasmuch as there must be a retrial, we think a discussion of it unnecessary. The court, in its submission of the case to the jury, misdirected them. Over the objection of the defendant, it gave them the following instruction:

"The court instructs the jury that there is no question of fraud or bad faith on the part of the plaintiff Day made by the pleadings in this case, and you have, therefore, nothing to consider as to this. But the important and controlling question is, whether the plaintiff Day was, in fact, the owner of, and in possession of, the property in question at the time of the levy of the execution on the same by the defendant, J. A. Israel, for The Farmers' National Bank of Frankfort, Indiana, as alleged in the answer, or whether the property was then the property of J. B. Hindry and in his possession. If you find from the evidence the property was that of plaintiff, your verdict should be for the plaintiff, and in such case it is your duty to assess the amount of damages sustained by him on account of the levy."

If nothing worse, the foregoing instruction was misleading. The theory of both parties was that the plaintiff had bought the property from its owner, and had paid for it. Upon this theory the plaintiff became, as against Hindry, invested with the title. The question was not whether as between the plaintiff and Hindry, the former owned the property, but whether, as against the defendant, the sale was ef-

fectual. The jury were simply asked to say whether the plaintiff or Hindry owned the property. The distinction between a title good as against all the world, and a title good as between the parties, but invalid as against creditors, was not pointed out; and the jury may well have thought that the title which the plaintiff acquired by his purchase, regardless of any question concerning delivery and change of possession, was sufficient to warrant a verdict in his favor. Nor were the defects supplied by any other instruction. The following was probably relied on to prevent a misunderstanding:

“The court instructs the jury that the change of possession required on a sale of personal property to make the same valid as against creditors of the seller, must be an open, notorious and visible change, such as to apprise the community, or those accustomed to deal with the seller, that the property has changed hands, and that the title has passed out of the seller into the purchaser. To constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another, if the buyer does such acts as make visible signs of his ownership, and maintains that relation to the property purchased which owners of property generally sustain to their own property.” If the foregoing were, even abstractly, a correct statement of the law, it would hardly cure the vice with which the instruction we have been discussing is infected. But it is not correct. The statute requires that the sale be accompanied by immediate delivery, and followed by an actual and continued change of possession. If the evidence showed a delivery at all, it left the time when it took place in uncertainty. Whether it accompanied the sale, or was made some time afterwards, is, at least, doubtful; and it is by no means certain that the plaintiff ever took possession, ex-

cept symbolically, of a considerable portion of the property. The question of immediate delivery, or actual or continued change of possession, was not submitted. The change which the court described, was not necessarily an actual change. It was said that it must be open, notorious and visible; but it was also said that the property need not be moved or disturbed if the buyer would do such acts as would make visible signs of his ownership, and would maintain that relation to the property purchased which owners of property sustained to their own property. What acts should be done, the court left to conjecture. In *Cook v. Mann*, 6 Colo, 21, Justice Elbert made the acts consist in the employment of the usual *indicia* of ownership. The *indicia* of ownership are necessarily different in different cases. Chattels capable of manual delivery and removal must be removed by the purchaser and taken into his custody. Said Chief Justice Beck in *Bassinger v. Spangler*, 9 Colo. 179: "The statute is plain, positive and peremptory. It admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor." See also *Atchison v. Graham*, 14 Colo. 217.

But where the subject of the sale does not reasonably admit of an actual delivery, the purchaser must manifest his ownership by some other act, and what that shall be is dependent upon the character of the property. Delivery of a stock of goods in a store, and of a stack of hay in a field, would be made differently, and the *indicia* of ownership in the two cases would not be the same; but the acts of possession must be unmistakable; they must be such as to apprise the community that the title has changed.—*Lay v. Neville*, 25 Calif. 546; *Cook v. Mann*, *supra*.

The question of the sufficiency of the *indicia* of ownership in this case was not submitted by the in-

struction. The court told the jury that such acts must have been done by the buyer as would make visible signs of ownership, and that he must maintain that relation to this property which owners generally sustain to theirs. The plaintiff went over to the Hindry ranch every day, and had his cattle fed from stacks of hay standing on that ranch. Without explanation of what the court meant by acts which "make visible signs of ownership," the jury may have thought that the plaintiff's daily trips and his appropriation of hay, were acts which constituted visible signs of ownership and evidenced the required relation of the purchaser to the property. Those acts were certainly not inconsistent with ownership, and were entirely visible, but alone they were not sufficient to satisfy the requirements of the statute.

Aside from the erroneous character of this instruction, its language was so general and indefinite that the jury could hardly regard it as a qualification or explanation of the other instruction, which told them that the controlling question was, whether the plaintiff, having bought the property from Hindry and paid him for it, was its owner, or whether Hindry, having sold the property to the plaintiff, and received the purchase price, was its owner. Reading the plain language of that instruction, and without advice that its apparent meaning was not its real meaning, the jury probably returned a speedy verdict.

The defendant sought to avoid the effect of the instruction we have reviewed by asking the court for others correctly applying the law to the facts, but his requests were refused. Whether, if they had been given, they would have made the instructions good

as a whole is doubtful, and the result of the trial would probably have been the same that it was.

The judgment is reversed.

Reversed.

[No. 2021.]

CROSBY V. STRATTON.

1. Trover—Possession—Title.

To sustain an action of trover there must be in plaintiff at the time of the supposed conversion a lawful possession, or the right to immediate possession. There must be an invasion of a legal, as contradistinguished from an equitable, right. There can be no conversion of property, the title to which consists only in the right at some future time to acquire it by purchase.

2. Corporations—Stockholders—Right to Purchase Stock—Trover.

The right of a stockholder to purchase a certain proportion of a certain amount of stock to be sold by the corporation does not give the stockholder a right to any specific shares of stock, and would not support an action in trover against another stockholder, who purchased more than his proportional part of the stock, for the excess of stock so purchased.

3. Same—Pleading.

In an action by one stockholder against another, a complaint which alleged that the corporation had a certain amount of capital stock for sale of which each stockholder had a right to purchase a part in proportion to the stock held by him, and that defendant caused to be issued and sold to himself a large number of shares in excess of his proportional part, but which failed to show that defendant had not acquired a right to such excess by purchase from some other stockholder or otherwise, is insufficient to allege a wrongful conversion of the stock by defendant.

4. Same.

In an action by one stockholder against another a complaint which alleges that the corporation had a certain amount of capital stock for sale, of which each stockholder had a right to purchase a part in proportion to the amount of stock held by him, but that defendant caused to be issued to himself a large number of shares in excess of the number he was entitled to purchase, and thereby plaintiff was unable to obtain the stock he was entitled to, although he was at all times ready, able

and desirous to subscribe and pay for the same, but which fails to allege that he ever offered to subscribe for the same and was refused, and which fails to show what disposition was made of the balance of the stock which was more than sufficient to have supplied plaintiff, is insufficient to state a cause of action against any person as the allegations are entirely consistent with a forfeiture or abandonment of his right to purchase.

5. Corporations—Stockholders—Right to Purchase Stock—Waiver.

Where a stockholder of a corporation having a right to purchase a proportional part of stock offered for sale by the corporation fails to assert his right within a reasonable time, he will be deemed to have abandoned his right.

6. Corporations—Stockholders—Preference Right to Purchase Stock.

The original stockholders of a corporation have a preference right to purchase the original stock of the corporation which remains untaken at the time of the incorporation, or new stock in case of an increase of the capital stock, pro rata, according to the amount of stock held by each stockholder, but such preference right does not extend to capital stock which has been issued and paid for and retransferred by the stockholders to the corporation as part of its general assets.

7. Same.

Where the stockholders of a corporation transferred to the corporation to be used as general assets part of the stock held by them, the fact that the officers of the corporation reported such stock as unissued stock could not change its character from issued to unissued stock so as to give to the stockholders a preference right to purchase the same.

Appeal from the District Court of El Paso County.

MESSRS. PATTERSON, RICHARDSON & HAWKINS and
MESSRS. LUNT, BROOKS & WILLCOX, for appellant.

MR. JOSEPH W. ADY, MR. ROBERT E. LEWIS and
MESSRS. DINES & WHITTED, for appellee.

THOMSON, J.

Walter F. Crosby brought this suit against Winfield S. Stratton to recover damages from the latter for the alleged wrongful conversion by him of stock

in The Portland Mining Company, to which the former averred himself to be entitled. The complaint set forth as follows: That the entire capital stock of The Portland Mining Company, a corporation consisting of 3,000,000 shares of the par value of one dollar each, was, at the date of the organization of the company, issued, fully paid and non-assessable, in consideration of certain mining property then conveyed to the corporation; that afterwards, and prior to the 17th day of April, 1894, the stockholders of the company, of whom the plaintiff was one, transferred to the company 704,000 shares of this stock, to be held for its use and benefit, and to be part of its general assets; that this stock was not reported by the officers of the company as issued or outstanding, but as substantially unissued stock, not constituting part of the outstanding stock of the company; that the then stockholders, by virtue of their holdings, had each an undivided interest and right of property in and to the stock so turned into the company's treasury, equal to his proportionate ownership of the outstanding stock of the corporation; that on the 17th day of April, 1894, the plaintiff was the owner of 120,000 shares, and the defendant was the owner of 215,000 shares, of the then outstanding stock, and that the defendant then was, and continued to be, a director of the company; that on the last named day, the directors of the company, by resolution, authorized and directed the sale of the 704,000 shares which had been transferred to the company, for the price of twelve and one-half cents per share, for the general purposes of the corporation; that by virtue of the property of the stockholders in the stock so ordered to be sold, each stockholder, as incident to his ownership of outstanding stock, had the right to subscribe for, and to have allotted and issued to him, shares of the stock so

ordered to be sold, in proportion to his then holdings; that of such stock the plaintiff was entitled to 65,000 shares, and the defendant to 117,424; that by reason of his office as director, and of his participation in the offer of the stock for sale, and the sale, the defendant was well acquainted with the rights of the stockholders in the stock to be sold, but nevertheless caused to be issued to himself 208,000 shares, an excess of 90,576 over the number to which, as a stockholder, he had any right; that of those 90,576 shares, the proportion to which the plaintiff was entitled, was 28,641 shares; that the plaintiff was on the 17th day of April, 1894, and has ever since been, ready, able and desirous to subscribe for, and have allotted to him, those 28,641 shares, but by reason of the wrongful act of the defendant in causing them to be allotted to himself, and holding and retaining them from the plaintiff, the latter has been unable to subscribe for, have allotted to him or receive those shares, or any of them, or any stock in lieu of them, and that on the 10th day of January, 1898, the plaintiff tendered to the defendant twelve and one-half cents per share for each of the 28,641 shares, and demanded their delivery to him, but the defendant refused to comply with the demand. Judgment was demanded for \$57,282, the alleged value of the stock withheld, and \$13,461.27, the amount which the defendant was averred to have received as dividends earned by that stock. To the foregoing complaint a demurrer was sustained, and the plaintiff declining to amend, judgment was entered against him, and he appealed to this court.

The theory of the plaintiff, as outlined in the argument of his counsel, is that the stock transferred to the company, or, following an expression of counsel, covered back into the treasury of the company, became a fund, in the specific property constituting

which, all the stockholders were interested; that when the stock was offered for sale, it was the right of each stockholder, upon payment of the price, to receive such number of shares, as upon a division of the stock among the stockholders in proportion to their respective holdings, would be allotted to him; and that when the defendant received 90,576 shares in excess of the number to which he had any right in virtue of his holdings, he took 28,641 shares to which a calculation of the plaintiff's proportionate interest in such excess, shows the latter to be entitled. We shall first examine the complaint to see whether, on the plaintiff's theory that, as a stockholder, he had the right to subscribe, pay for and receive, a certain portion of the stock which had been transferred to the company, it states a cause of action against the defendant; and we shall afterwards inquire into the soundness of the theory.

1. Counsel say that the alleged conduct of the defendant amounted to a wrongful conversion of the plaintiff's property, and in support of his claim to a recovery, they refer to some authorities which we shall notice later. It is now well established that shares of stock in a corporation, may, like any other species of personalty, be the subject of conversion. Whether, in a given case, there is a conversion or not, is dependent upon the nature of the plaintiff's right in the property, and the character of the act constituting the alleged conversion. To sustain trover, there must be in the plaintiff at the time of the supposed conversion, a lawful possession, or the right to immediate possession. There must be an invasion of a legal, as contradistinguished from an equitable, right. There can be no conversion of property, the title to which consists only in the right at some future time to acquire it by purchase.—*Wilson v. Wilson*, 37 Md. 1; *Wheeler v. Train*, 3 Pick. 254;

Clark v. Draper, 19 N. H. 419; *Winship v. Neale*, 10 Gray 382; *Forth v. Pursley*, 82 Ill. 152; Greenleaf on Evidence, § 637.

A conversion consists of some act of dominion exerted over one's property, in denial of his right, or inconsistent with it.—Cooley on Torts, 448; *Smelting & Refining Co. v. Tabor*, 13 Colo. 41.

At the time of the alleged conversion by the defendant, the plaintiff had no right, or shadow of right, legal or equitable, to any specific shares of stock in the treasury of The Portland Mining Company. The most that can be claimed in his behalf is that he was entitled to go to the company's office, subscribe for a certain number of shares, pay into the treasury twelve and one-half cents per share for the number taken, and receive a transfer of the legal title. But he had no right to demand any particular shares; and until he should offer to subscribe and pay, he was as destitute of interest in the stock as a stranger to the company. He had no better claim upon the shares the defendant received, than upon the shares any other person received, if stock was sold to any other person. In his complaint he described his interest as an *undivided* interest in the entire 704,000 shares which the stockholders turned into the treasury; and it is not in virtue of possession or right of possession in himself, but in virtue of the result he has reached in working out an arithmetical problem, that he claims to be entitled to 28,641 shares of the stock issued to the defendant.

The following are the cases to which we are referred for the plaintiff, and on the authority of which it is claimed that a conversion of the plaintiff's stock by the defendant appears from the facts stated in the complaint.—*Payne v. Elliot*, 54 Calif. 339; *Budd v. Multomah Co.*, 12 Ore. 271; *Kuhn v. McAllister*, 96 U. S. 87.

We suppose those cases come as near supporting the plaintiff's contention as any that can be found; but they afford it no support whatever. In each case, ownership, or actual possession, of specific stock in the plaintiff, and a wrongful conversion by the defendant of that identical stock, was averred. The finding in *Payne v. Elliot* was that the plaintiff delivered the stock to the defendants to hold as security for \$409 which he owed them. In *Kuhn v. McAllister*, the allegations were that the plaintiff was the owner of 250 shares of the paid up capital stock of the North Star Silver Mining Company, represented by five certificates for fifty shares each, and that the defendant without his consent and wrongfully, took those shares and converted them to his own use. In *Budd v. Multomah Co.*, the allegations were to the same effect.

But giving the plaintiff the benefit of his contention that the defendant would, by causing treasury stock to be issued to himself in excess of his rightful share, be guilty of a wrongful conversion, we find nothing in the complaint to indicate that he did actually take more than his rightful share. It is true the complaint says that the plaintiff caused to be issued to himself shares largely in excess of the number to which he was entitled according to his holdings as a stockholder in the company. But because he received more than the amount to which his holding of stock would entitle him, it by no means follows that he received more than the amount to which, as a matter of fact, he had a right. He may have purchased the share of some other stockholder in the treasury stock, and caused that to be included in the certificate or certificates issued to him; and outside of his purchase, he may have received only what his previous holding would authorize. Where a hypothesis exonerating the defendant from liability is con-

sistent with all the allegations of the complaint, the pleading is bad.—*Hallack v. Bank*, 14 Colo. App. 79.

If, however, the plaintiff had the right to purchase the stock, and the directors or governing body, no matter for what reason, refused to receive his subscription and his money, an action would lie in his favor against some person—presumably the corporation.—See *Dousman v. Mining & Smelting Co.*, 40 Wis. 418; Sedgwick, J., in *Gray v. Bank*, 3 Mass. 363.

But it does not appear from the complaint that the plaintiff ever offered to subscribe, or that any obstacle in the way of his purchase was ever interposed by any one. The complaint says that on the 17th day of April, 1894, and ever afterwards, he was ready, able and desirous to subscribe and pay for the 28,641 shares, but that because the defendant wrongfully had those shares issued to himself, plaintiff was unable to obtain them, or any other stock in their place. The defendant took 208,000 shares. The total number ordered sold was 704,000 shares. After the defendant made his purchase, 496,000 shares remained. It does not appear that this remainder was ever sold. But the plaintiff says that the act of the defendant in taking 208,000 shares, rendered him unable to obtain any of the balance. Without explanation, as a statement of cause and effect, that allegation is an absurdity. As the plaintiff has given us the facts in his complaint, he had ample opportunity to offer to subscribe for the stock. But he could not be compelled to subscribe. The officers of the corporation could not know whether he proposed to exercise his right or not, unless he indicated his purpose so to do. If he had the right, it was his duty to assert it within a reasonable time, otherwise it became forfeited.—1 Cook on Stockholders, § 286; 1 Morawetz on Private Corporations,

§ 455; Sedgwick, J., in *Gray v. Bank*, 3 Mass. 388, 389.

That the plaintiff voluntarily abandoned his rights in the stock, and has, therefore, in relation to it, no ground of complaint against any person, is entirely consistent with all the allegations of the complaint.

2. We come now to an examination of the underlying theory of the case. Had the original stockholders of the corporation any right, in law, to a preference over strangers in the purchase of the 704,000 shares they had transferred to the company, or had one stockholder any preference over another in the purchase? Such preference does exist in relation to original stock which remains untaken, and therefore unissued, at the time of the incorporation; and in case of an increase of the capital stock, each of the first stockholders has the right to subscribe for and purchase his *pro rata* share of the new stock. One reason on which the rule in either case rests, is that the stockholder has the right to preserve the proportionate interest in the corporation first acquired by him. To dispose of the unissued or added stock to strangers, or to other stockholders, without affording him an opportunity to take his *pro rata* share, would be, without his consent, to impair his interest and influence in the corporation, and diminish the relative value of his holdings; and this the directors, who are trustees for the stockholders, may not lawfully do.—*Agricultural Society v. Eichholtz*, 45 Kan. 164; *Jones v. Morrison*, 31 Minn. 140, 153; *Eidman v. Bowman*, 58 Ill. 444, 447; *Reese v. Bank*, 31 Pa. St. 78; Sewell, J., in *Gray v. Bank*, *supra*; *Atkins v. Albree*, 94 Mass. 359; Angell & Ames on Corporations, § 554.

But because, to prevent impairment of their interests, corporators have a preference in the pur-

chase of unissued or new stock, it does not follow that they have any right over strangers in the purchase of stock which has been paid for and issued, but transferred back to the corporation as part of its general assets. Their right in the one case is founded on reasons which have no existence in the other. The issued stock of a corporation represents its paid up capital. The holder owns it and disposes of it as he sees fit, and if it finds its way back into the treasury of the corporation, it becomes assets in the same sense that the corporation's other property is assets. It is still part of the paid up capital; and its sale no more affects the value of the other stock, or the standing of the stockholders in the corporation, than the sale of the corporation's tools or machinery. The relative value of all the stock is the same whether the particular stock of which we are speaking remains in the hands of the original holders, or has been acquired from them by the corporation, and placed in its treasury. In the case at bar, the entire authorized capital stock of the company had been issued and paid for in full. The holders transferred a certain portion of it to the company, for what purpose is not explicitly stated, but upon a fair presumption from all the averments in the complaint, to be sold, and the proceeds used in the development of the company's property to the enhancement of the value of the remaining shares. The complaint says that it was to be held for the company's use and benefit, and as part of its general assets. If that language means anything, it means that the stock was to be used like the company's other assets, in furtherance of the objects of the corporation. And further on the complaint states that it was ordered to be sold for the general purposes of the company. It was paid up stock when it was in the hands of the holders, and by its transfer to the company its character was

not changed. The complaint says "that said stock was not, and was not reported by the officers of said company as issued or outstanding, but as substantially unissued stock not constituting part of the outstanding capital stock of the company, and the issue of said stock, at any time, making it participate in the assets, dividends and control of the said company, would decrease the *pro rata* participation of the other stockholders in said company in the same ratio as the number of said unissued shares bore to the total capitalization of said company." One portion of the above we do not understand very well, and the other portion we do not understand at all. How a report by the officers of the company, whatever it might be, could make issued stock unissued stock, or could reverse the effect of facts, is what we fail totally to understand; the complaint furnishes no solution of the difficulty, and in the absence of explanation, we must remain of the opinion that the character of the stock was unaffected by the report. If by the succeeding language is meant that the re-issue of the transferred stock would have the same effect upon the value of individual holdings that would follow an issue of new stock, or of original, but hitherto untaken stock, then the pleader has given us the statement of a false proposition. It is true that by parting with a portion of his stock, the influence of the holder at corporate elections would be diminished, and in case of dividends, he would receive less money; but the relative value of each individual share would remain the same. The amount of issued stock would not be changed; and the proportion between each issued share and the total number of issued shares, would be preserved. This would not be the case if dormant stock were released, or existing values lowered by a dilution of new stock. The evident purpose of the transfer to the company was

to enable it to raise money for the purposes of the enterprise in which it was engaged. If the stockholders had sold their stock on the outside for twelve and one-half cents per share, and paid the money into the company's treasury, the desired result would have been accomplished as effectually as by the method which was employed. It is altogether immaterial whether the stockholders sold the stock themselves, or turned it over to the company to be sold. In either case they parted with all their interest in the stock, and put its further disposition entirely beyond their control. So far as our research has extended, the authorities are unanimous that where stock, once issued, returns to the possession of the corporation, upon its reissue and sale the right of purchase of stockholders and strangers is the same.—*Hartridge v. Rockwell*, R. M. Charlton, 260; *State v. Smith*, 48 Vt. 266; 1 Morawetz on Corporations, § 455; 2 Thompson on Corporations, § 2100.

In *Kimmell v. Geeting*, 2 Grant's Cases, 125, there was a fraudulent combination and conspiracy among the defendants, who were the managers of the Sunset and Bedford Turnpike Co., to divide among themselves stock, the purchase of which for the benefit of the corporators, they had directed by resolution. This case, although relied on by the plaintiff, is not in point. No conspiracy or fraudulent practice is charged in this complaint.

The demurrer was properly sustained, and the judgment will be affirmed. *Affirmed.*

[No. 2100.]

PATERSON V. NURNBERG ET AL.

1. Contracts—Water Rights—Diversion of Water.

Plaintiff contracted with defendant to enlarge defendant's ditch and to run water from his own into defendant's ditch,

defendant to own two-thirds and plaintiff one-third of the ditch, and water flowing therein; provided if either party should fail to furnish water in proportion to his interest he should be allowed only an amount proportioned to the volume supplied by him. Held, that the right of either party to water in proportion to the amount turned into the ditch contemplated the capacity of the ditch to carry all the water furnished by both, and that plaintiff could not by filling the ditch beyond his interest so that it would not carry the water defendant was entitled to run therein deprive defendant of his two-thirds interest in the water flowing in the ditch.

2. Water Rights—Division of Water—Contracts.

Where two parties by contract use a ditch in common, the water to be divided in proportion to the amount furnished to the ditch by each, the amount of water either party is entitled to withdraw from the ditch should be determined by the amount that runs through the ditch, and not by the amount turned in, where the capacity of the ditch at its upper end is greater than that at the lower.

3. Costs—Injunction.

Where plaintiff sought an injunction against defendant and defendant, by cross-complaint, sought an injunction against plaintiff, and both parties failed to make a case, each party should pay the costs incurred by his suit.

Appeal from the District Court of Garfield County.

Mr. J. W. DOLLISON, for appellant.

Mr. EDWARD T. TAYLOR, for appellees.

THOMSON, J.

John Paterson brought this action against John Nurnberg and Eugene Nurnberg to recover damages against them for the alleged violation by them of a certain contract between the plaintiff and the defendant John Nurnberg, and for an injunction restraining them from further violation of the contract. The contract, a copy of which appears in the complaint, was in writing, and was dated on the 1st day of June, 1896, and acknowledged on the 27th day of November, 1896. It provided that the plaintiff might turn the

water from his own ditch, called the "Paterson Ditch," into a ditch belonging to Nurnberg, called the "Nurnberg Lateral," the enlargement of which, as part of the Paterson ditch, he had already substantially completed; that he should put in and maintain two measuring flumes, one to be located in his own ditch immediately above where it entered the Nurnberg lateral, and the other in the Nurnberg lateral below where Nurnberg tapped the lateral at the lowest point on the ditch; and that Nurnberg should own a two-thirds, and the plaintiff a one-third interest in the ditch, and the water flowing therein; provided, that if either party should fail to furnish water in proportion to his interest, he should be allowed only an amount proportioned to the volume supplied by him. The water was to be used for irrigating and domestic purposes.

In the view we take of the case, further statement of the contract is unnecessary. The complaint alleged that the defendants had obstructed the flow of water in the ditch, thus injuring the ditch; that the plaintiff had turned into the ditch 1.61 cubic feet of water per second, which was more than one-third of all the water flowing in the ditch; but that the defendants had taken and appropriated all the water turned into the ditch by them, and about one-half of that turned into the ditch by the plaintiff, so that he was able to obtain only .7595 cubic feet per second.

The defendants answered denying the allegations of the complaint, except as to the execution of the contract; and by way of cross-complaint averred that the plaintiff had never placed in the Nurnberg lateral, nor in his own ditch, the measuring flumes provided for in the contract; that he had not enlarged the lateral as contemplated in the agreement; that he had never furnished one-third of the water as required by the agreement; that he had furnished no constant

flow, but turned water in irregularly, sometimes overflowing the defendant's ditch and sometimes supplying no water at all; but that whether he furnished water or not, he constantly took water from the ditch to which he had no right, and deprived the defendants of water to which, under the contract, they were entitled. An injunction was prayed restraining him from taking more than a just proportion of the water, or from taking any water at all, until he had complied with the contract.

The court, after finding that the defendants had fully complied with all the provisions of the contract, decreed that they be perpetually enjoined and restrained from interfering in any manner with the plaintiff, his agents, heirs and assigns in the free and peaceable use of an undivided one-third interest in the Nurnberg lateral ditch, and in the water flowing in the ditch, whenever the plaintiff should be turning into the ditch one-third of the water it would convey; and after finding that the plaintiff had not complied with the contract, in that he had not completed the enlargement of the Nurnberg lateral ditch, or put in or maintained measuring boxes at the places named in the contract; and after further finding that the plaintiff was obtaining through that ditch one-third of the amount of water that it would carry across the Nurnberg premises, and was not entitled to any more water than he was receiving, proceeded to decree an injunction against him, perpetually restraining him from interfering with the defendants in their free and peaceable use and enjoyment of an undivided two-thirds interest in the Nurnberg lateral ditch, and in the water flowing in the ditch, whenever the defendants should be turning into the ditch two-thirds of the water it would carry. The costs were adjudged against the plaintiff.

The decree is a curiosity. It makes a finding of a

complete compliance by the defendants with the contract, and of the obtaining by the plaintiff of all the water from the ditch that he was entitled to, thus negating all supposition of interference by the defendants with the plaintiff's rights, the basis of an injunction against the defendants forever restraining them from interfering with the plaintiff's estate in the ditch and water. It also makes a finding that the plaintiff had not completed the enlargement of the ditch, or put in measuring flumes the basis of an order forever enjoining him from interfering with the defendants in the use of the water to which they were entitled. The defendants were enjoined from doing something they were not doing, or, for aught the court found, proposing to do; and the plaintiff was enjoined from doing something he was not doing, or, for aught the court found, proposing to do. Even if he was bound to complete the enlargement of the ditch, his failure to do so did not constitute an interference with the defendants in the use of their share of the water. But both parties to the contract agreed that he had already substantially completed its enlargement, and there was no agreement by him to enlarge it further. And how his failure to put in measuring flumes could prevent the defendants from obtaining the water to which they were entitled does not appear in the decree, evidence or briefs.

The testimony was conflicting; but there was evidence to sustain the court's findings of fact; indeed, we are not sure that it did not preponderate in their favor. Theodore Rosenberg, a hydraulic engineer, was a witness for the plaintiff. He testified that he measured the ditch on May 26, 1898. He testified that the actual capacity of the ditch, in its condition at that time, was 2.54 cubic feet per second, diminishing to 1.91 feet in the lower part of the ditch. We do not get the full benefit of his testimony, because he was ap-

parently testifying from a map, and, frequently, in describing the situation, used the expression, "from there to there." The map is not before us, and while the judge who heard him understood him, his meaning is not clear to us. But the plaintiff, in his complaint, admits receiving .7595 cubic feet of water per second, and in view of the testimony of Rosenberg, which we do understand, we are unable to say that the quantity represented by those figures was not one-third of the average capacity of the ditch. The court, however, was able to make an accurate deduction from his whole testimony, a part of which only is intelligible to us, and the legal presumption is that its finding that the plaintiff received one-third of the capacity of the ditch is correct. We do not regard the allegation that the plaintiff received only about one-half of the water he turned into the ditch—the defendants taking the remainder—even if it had been supported by proof, as entitled to consideration, in view of the facts. It is true that the contract provided that if either party should fail to supply his share of the water, he should take out only in proportion to what he turned in; but that provision contemplated the ability of the ditch to carry all the water which both parties might furnish. The capacity of the ditch at its upper end was only 2.54 feet. If the plaintiff furnished 1.61 feet, the defendants were necessarily unable to supply their share, because the ditch would not carry it. The plaintiff could not, by flooding the ditch with water turned into it by himself, thereby preventing the defendants from exercising their right to supply two-thirds of its capacity, deprive them of their title to two-thirds of the water. If he could, he might fill the channel up and claim all the water, and the defendants, no matter what their ability and effort to provide their share, be crowded out of their own ditch.

There was evidence that the plaintiff did not maintain the measuring flumes required by the contract; there was evidence warranting the conclusion that there was no obstruction in the ditch for which either plaintiff or defendants were responsible; there was no proof that the plaintiff ever prevented the defendants from obtaining their just proportion of the water; and it was testified that the defendants never interfered with the plaintiff in obtaining the quantity of water to which he was entitled. We do not criticise the court's findings of fact. They were all warranted by the evidence; but they fall very far short of supporting the injunctions which were decreed against the parties.

As the plaintiff failed to make a case against the defendants, and the defendants failed to make a case against him, he should pay all the costs incurred in his suit against them, and they should pay all the costs in their suit against him.

The judgment will be reversed and remanded with instruction to the district court to enter a judgment dissolving both injunctions and dividing the costs between the parties as indicated in this opinion. The judgment in this court will be without costs.

Reversed.

[No. 2107.]

**THE WESTERN UNION TELEGRAPH COMPANY V. THE
BI-METALLIC BANK.**

1. Banks and Banking—Depositors—Contracts.

The contract between a bank and a depositor is that it will pay out his money only upon and in accordance with his express direction.

2. Bank Checks—Indorsement—Identity—Liability of Bank.

A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement, and if the bank mistake the identity of the payee or pay upon a forged indorsement, it is not a payment in pursuance

of its authority, and it will be responsible; but a bank may be relieved from liability for payment to the wrong person, or under an endorsement not genuine, when the circumstances of the case amount to a direction from the depositor to the banker to pay without reference to identification, or to the genuineness of the endorsement.

3. Same.

The local agent of a company was directed by the company to pay to W. H. Daly a certain sum. W. H. Daly, a different person, called and claimed to be the person to whom the money was directed to be paid. The agent was not satisfied with the identity, but gave him a check payable to W. H. Daly and took a receipt therefor. The check was endorsed by W. H. Daly, and cashed at a different bank than the one on which it was drawn. The drawee bank paid the check upon the endorsement, without any knowledge of the circumstances under which it was delivered. In an action by the drawer against the drawee bank, defendant cannot escape liability on the ground that the drawer, by delivering the check to Daly, identified him as the person to whom, or upon whose endorsement, payment might properly be made.

4. Same—Idem Sonans.

Where a bank paid a check to a person not entitled to it, and the payment was made solely upon a written endorsement, in an action by the depositor against the bank, the question of idem sonans cannot arise.

5. Same—Notice.

Where a check payable to W. H. Daly was endorsed by W. H. Daly, that fact was sufficient to have put the bank upon its guard and caused it to have made inquiry.

6. Same.

Where a bank had no knowledge of the error of a depositor in delivering a check to the wrong person, and the check was paid upon a written endorsement of a name different from that of the payee, in an action by the depositor to recover the amount of the check, the bank cannot invoke the doctrine, that where two persons are equally innocent and one is bound to know and act upon his knowledge and the other has no means of knowledge, the latter will not be compelled to bear a loss to exonerate the former.

7. Same—Possession.

The mere possession of a check will not justify a bank in making payment to the person in possession without identifica-

tion, or without evidence of the genuineness of the endorsement where the endorsement is in question.

Appeal from the District Court of El Paso County.

Mr. I. N. STEVENS and Mr. F. W. LIENAU, for appellant.

Mr. J. STANLEY JONES and Mr. CHARLES C. BUTLER, for appellee.

WILSON, P. J.

This suit grows out of the alleged payment of a check drawn by the plaintiff telegraph company upon the defendant bank to a person other than the payee, and without his endorsement. The main facts were contained in an agreed statement, that portion which is deemed material to the determination of this appeal being as follows:

"1. That on or about the 12th day of December, 1895, the agent and manager of plaintiff's office at the town of Cripple Creek was telegraphically instructed by the plaintiff to pay to one William H. Daily, at Cripple Creek, the sum of one hundred and seventy-two dollars (\$172.00).

"2. That a person presented himself at the office of said plaintiff, at Cripple Creek, representing himself to be said William H. Daily, and was so identified by one S. J. Polin.

"3. That the agent of the plaintiff thereupon drew a check on defendant's bank for one hundred and seventy-two dollars (\$172.00), to the order of William H. Daily, and handed it to the person so representing himself as such William H. Daily.

"4. That said person was not the William H. Daily for whom the money was intended by said telegraphic message.

"5. That said check, bearing endorsements as follows: Wm. H. Daley, S. J. Polin, Blum, and

stamped 'paid' by The First National Bank of Cripple Creek, was paid by the Bi-Metallic Bank, the defendant herein, December 14, 1895.

"6. That none of the endorsements on said check were made in the presence of or with the knowledge of the plaintiff's said agent.

"7. That the name of the person who so received said check from plaintiff's said agent is William H. Daley."

In addition to this, one witness, the agent or manager of plaintiff who drew the check, testified. His evidence was to the effect, in substance, that upon telegraphic instructions to pay a certain amount of money to W. H. Daily, he sent out a notice to that person. Afterwards, in answer to the message, a man presented himself and stated that he was the person to receive the money. He brought with him another man for identification, but the agent, not being satisfied with the identification, and knowing the person brought in for that purpose, as he stated it, to be "no good," he drew up a check for the amount to be paid, naming as payee the person named in the telegraphic transfer, spelling the name as there spelled, D-a-i-l-y, and gave it to the man who represented himself to be Daily; that he did this for the purpose of having the bank identify the payee, he not being satisfied himself. It also appears from his testimony that upon delivering the check, he took from the person representing himself to be the individual for whom the money was intended, a receipt for the money, which receipt was signed Wm. H. Daley. The check seems first to have been cashed by another bank. In due course of business it reached the defendant bank, the drawee, bearing upon its back the endorsements of Wm. H. Daley, S. J. Polin, Blum, and the "paid"

stamp of the First National Bank of Cripple Creek, and was by it paid and charged to the account of the plaintiff.

The contract between the bank and the depositor is that it will pay out his money only upon and in accordance with his express direction. A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine endorsement, and if the bank mistake the identity of the payee, or pay upon a forged endorsement, it is not a payment in pursuance of its authority, and it will be responsible. It is also true, however, that the bank may be relieved from liability for payment to the wrong person, or under an endorsement not genuine, when the circumstances of the case amount to a direction from the depositor to the banker to pay without reference to identification, or to the genuineness of the endorsement. These rules are well settled, and are supported by a long line of decisions of the highest authority. We cite a few: *Dodge v. Bank*, 20 Ohio St. 246; *Dodge v. Bank*, 30 Ohio St. 1; *Pickle v. Muse*, 88 Tenn. 382; *Jackson v. Bank*, 92 Tenn. 155; *Crippen, Lawrence & Co. v. Bank*, 51 Mo. App. 510; *Hatton v. Holmes*, 97 Calif. 208; *Welsh v. Bank*, 73 N. Y. 426; *Bank v. Bank*, 119 N. Y. 200; *Bank v. Bank*, 91 N. Y. 80; *Bank v. Whitmore*, 94 U. S. 343; 2 Daniels on Negotiable Instruments, § 1618, *et seq.*; *Shipman et al. v. Bank*, 126 N. Y. 319.

It is claimed by the appellee, and such was the ground upon which it is alleged the trial court based its judgment in its favor, that the circumstances of this case are such as to bring it within the exception to the general rule, and thereby release it from responsibility. It is claimed that the plaintiff, by delivering the check to Wm. H. Daley, and by accepting a receipt signed by him in that name, identified him as the person to whom payment might be properly

made, or under whose endorsement the drawee would be authorized to pay. In our opinion, the contention of appellee is not correct, and is not sustained by the authorities which counsel cite because, first, it does not appear that the defendant at the time of payment had any knowledge of the existence of these circumstances upon which it now relies to escape liability. It was not induced in the remotest degree to make payment on account of these circumstances. It did not even make payment to the person who received the check originally, or who claimed to be the payee. It paid to another bank which had in the first instance cashed the check, and in so doing relied solely upon the endorsements. It is not even shown that the bank which first cashed the check had any knowledge of the circumstances attending its delivery by the drawer. The authorities cited by counsel for appellee are all of cases which are clearly distinguishable in this respect from the one at bar. In all, the bank had knowledge, or there was communicated to it some fact or circumstances relative to the action of the drawer from which it might conclude that he had waived further identification, or any question as to the genuineness of endorsement. An additional fact in this case brings out in stronger light the dereliction and neglect of the bank, because in ignorance of all these circumstances attending the delivery of the check, it paid, as we have said, simply upon the face of the endorsement, and that endorsement did not purport to be that of the payee named in the check. It was that of a different name entirely. No question of *idem sonans* can arise, because, if for no other reason, payment was made upon the written endorsement only. The name of the endorser being different from that of the payee, was amply sufficient to have placed

the defendant upon its guard, and caused it to have made some inquiry.

Appellee invokes the doctrine that where two persons are equally innocent, and one is bound to know and act upon his knowledge, and the other has no means of knowledge, the latter will not be compelled to bear a loss for the purpose of exonerating the former. It contends that the plaintiff in this case was in default in giving the check to the wrong person, and that by means of this he was enabled to perpetrate the fraud; that this being the case, it cannot complain of the consequences of its own default against the defendant, who was misled by it without any fault of its own. This doctrine is sound where it is applicable, but we do not see wherein it is applicable under the facts of this case. In the first place, there is no evidence that the defendant was misled by the alleged default of the plaintiff, because it had no knowledge of it. We do not believe it to be in accord with the settled rules of commercial law that the mere possession of a check would justify a bank in making payment to the person who has such possession, without some identification, or some evidence of the genuineness of the endorsement, if an endorsement is in question. If there had been in this case a forged endorsement of the name of the payee, the defendant might possibly have had some ground upon which to stand in support of its contention, but this was not the case. It made payment under the endorsement of a name different from that of the payee. This fact alone would in our opinion prevent it absolutely from setting up this defense.

The judgment will be reversed.

Reversed.

[No. 2101.]

17	236
18	68
18	165

**CHAPMAN V. THE BOARD OF COUNTY COMMISSIONERS OF
PHILLIPS COUNTY.****Water Divisions—Salary of Superintendent—Liability of County
—Evidence.**

In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district, and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for short periods of floods or freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any liability against the county.

Appeal from the District Court of Phillips County.

Mr. W. D. KELSEY, for appellant.

Mr. J. S. BENNETT, for appellee.

WILSON, P. J.

Plaintiff sued the defendant county to recover an amount alleged to be due from it to him as its *pro rata* share of his salary as superintendent of irrigation for water division number one. Defendant answered, denying that the county was embraced in the said division. Trial was to the court, and judgment was for the defendant. The only exception saved was to the judgment, and the only question to be determined is whether this was supported by the evidence. The statutory provisions applicable to the controversy are as follows: "That water district No. 65 shall consist of all lands in the state of Colorado irrigated by the water taken from the middle and north forks of the Republican river, from Sandy and Frenchman's creeks, and the tributaries of these

streams."—Mills' Ann. Stats., sec. 2377. It is conceded by both parties that if the defendant is liable at all it is by virtue of this section. The section creating water division number one reads as follows: "All water districts now or hereafter to be formed consisting of lands in the state of Colorado irrigated by water taken from the South Platte river, the North Platte river, the Big Laramie river, the north and middle forks of the Republican river, Sandy and Frenchman's creeks, and the streams draining into the said rivers and creeks, shall constitute water division No. 1."—Mills' Ann. Stats., sec. 2441. Other sections of the statute provide that the salary of the superintendent of irrigation shall be borne by the county in which the division might lie, and that in case it extends into two or more counties, then each of the counties into which it so extends, shall pay its *pro rata* share.—Mills' Ann. Stats., secs. 2387, 2457. It will be seen that neither in the section creating the water district nor the water division, is Phillips county mentioned by name. As to whether, then, it was embraced in either, was a question of fact to be determined upon the evidence. No testimony was offered on behalf of the defendant, and none was necessary. The plaintiff failed to prove his case. The evidence did not show the facts to establish that Phillips county was within the water division, and the great weight of it was to the contrary. Only one witness was put upon the stand by plaintiff to testify as to these necessary facts. The substance of his evidence was to the effect that there was no natural stream whatever in the county,—no stream of running water sufficient to irrigate land from. There was in the county a so-called Frenchman's creek, but it did not contain water in sufficient quantity for any irrigation purposes, except during the brief period of a flood or freshet, and that there was not and had not

been any irrigation from it. He described the stream as follows: "It is what we call a dry creek, or gravel creek. There seems to be water under the gravel, but it does not seem to be a running stream at all." The witness had attempted some years before and previous to the time when plaintiff's services began, to do a little irrigating from this so-called stream by placing a small dam in it to catch flood and freshet waters, excavating above the dam and having a pump to raise the water, if any was obtained, to a small ditch which he constructed to his land near by, but his efforts were not successful, and he had abandoned it, except that his ditch of course still remained, and in case of a flood it would convey some of the flood-water to his land.

In answer to another question, he testified that no waters from this so-called stream were used for irrigating purposes in the county. He testified also as to one other farmer who had been trying to irrigate for six or seven years, but had not succeeded, and had quit it.

Whatever the facts may be, the testimony in this case did not show that any lands in Phillips county were irrigated by water taken from any of the streams mentioned in the sections which we have quoted. Upon this presentation of the case, no other judgment than that rendered was possible.

The judgment will be affirmed.

Affirmed.

[No. 2099.]

SMITH ET AL. v. THE POST PRINTING AND PUBLISHING
COMPANY.

1. Change of Venue—Appearance—Filing Demurrer—Waiver.

A defendant entitled to remove a cause for trial to another county on the ground that he resides and was served with summons in such other county, does not waive his right of removal

by filing a demurrer to plaintiff's complaint at the time he presents his application for removal.

2. Change of Venue—Time for Filing Application.

An application to remove a cause to another county for trial on the ground that defendant resides and was served with summons in such other county is in apt time if filed within the time fixed by the summons for defendant to appear and plead.

3. Change of Venue—Application—Negativng Exceptions—Pleading.

Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions.

4. Contracts—Guaranty—Goods Sold and Delivered.

An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator, is an action upon the guaranty contract, and not an action for goods sold and delivered, and the code provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply.

5. Contracts—Guaranty—Place of Trial.

The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence.

Appeal from the County Court of Arapahoe County.

MR. GEORGE S. ADAMS, MR. PETRUS NELSON and
MR. T. M. ROBINSON, for appellants.

MR. JAMES H. BROWN and MR. ANDREW W. GIL-
LETTE, for appellee.

WILSON, P. J.

Defendant Robert F. Smith contracted with the plaintiff printing and publishing company for a route for the circulation and sale of the Denver Evening

Post, a publication of plaintiff. The contract was in writing, and attached to, or endorsed upon it was the following, also in writing, signed by the other three defendants: "The Post Printing and Publishing Company. You are hereby authorized to furnish Robert F. Smith copies of your paper on terms above stated, the undersigned agreeing to become responsible to you for the prompt payment of all bills for such papers, and in case payment is not made each month as specified above, to pay The Post Printing and Publishing Company the arrears upon demand."

Plaintiff claimed that Smith had violated the contract by failing to make payment in accordance with its terms, and instituted this suit against him and his guarantors or sureties for the recovery of a balance alleged to be due for papers furnished. The suit was begun in the county court of Arapahoe county. Summons issued to and was served upon all of the defendants in Boulder county, on April 4. On May 3, the defendants filed a motion to change the place of trial to Boulder county, which they claimed was the proper county for trial under the provisions of code section 27, because as shown by affidavit and not disputed, the defendants were at the commencement of the action and ever since had been residents of said county of Boulder; that the service of summons was had upon them in said county of Boulder, and that the contract upon which the action was brought was to be performed in said county of Boulder. On the same day, defendants also filed a general demurrer to the complaint.

It is well settled that the defendants' motion for change of place of trial was well taken, and that the court had no discretion except to allow it, unless one or both of the contentions of the appelle in support of the ruling of the court are correct.—*Smith v. The People*, 2 Colo. App. 99; *Pearse v. Bordeleau*, 3 Colo.

App. 351; *D. & R. G. R. R. Co. v. Cahill*, 8 Colo. App. 158. The position of plaintiff is, first, that the defendants waived their right to the statutory privilege of changing the place of trial by filing a demurrer to the complaint, and thereby entering a general appearance; second, that the showing was not sufficient, because the affidavit did not negative all of the provisions of code section 27, whereby a county other than that in which the defendants resided and were served with process, might be a proper place of trial. We think neither position of the plaintiff is tenable. Neither upon reason or principle was it necessary as contended that defendants should have appeared only specially for this motion in order to have saved their rights. A special appearance is resorted to and necessary where a defendant denies that the court has secured jurisdiction over his person by reason of some defect in the process of the court, or of improper service. In such cases the defendant is in the position of one saying, the court has not secured jurisdiction over me, and hence I cannot be compelled to appear in the court to make any pleading whatever. The only object of process being to give a defendant notice, and compel him to come into court and defend, it is obvious that if he voluntarily comes in, even under a defective summons or with defective service, makes a general appearance and enters upon his defense, he thereby submits himself to the jurisdiction of the court, and the court having jurisdiction of the subject-matter, he thereby waives and ought to waive the privilege of thereafter objecting to the insufficient process or service. An entirely different proposition is here involved. In this state, the jurisdiction of courts of record is co-extensive with the boundaries of the state.—*Fletcher v. Stowell*, 17 Colo. 94. A suit may be instituted in a court of record in any county, and summons issued to and be served in any

other county of the state, and the service will be good, and the court will thereby acquire full and complete jurisdiction of the person. In certain designated cases, however, the code provides that even though the court has acquired complete jurisdiction of the person, and has also jurisdiction of the subject-matter, the defendant may come in and upon application in apt time as a matter of right, divest the court of its jurisdiction and compel the removal of the cause to another county for trial. Such is the case presented here. The county court of Arapahoe county acquired full and complete personal jurisdiction of the defendants by the service of process upon them in Boulder county. This presents an entirely different case from those in the Colorado reports to which we are referred by counsel, wherein the jurisdiction is attacked. In those cases it was held that if the process or the service was insufficient, it was not effective to bring in the defendant and compel him to plead within any time, provided that he did nothing which the law said should amount to a voluntary acknowledgment of the sufficiency of the process or of the service, and a waiver of all right to attack it. Here the service of summons was fully as effective to compel the defendants to appear and plead as if the summons had been issued from the Boulder county court. In a number of cases where this code section has been under consideration, it has been said that a defendant to avail himself of this privilege to change the place of trial, should appear and move for it in apt time, but nowhere has it been held what is apt time. Without undertaking to fix a definite and specific period of time, we think it sufficient to say that in our opinion a party is not too late who seeks to avail himself of the privilege before the expiration of the time within which he is by the summons required to appear and plead, he not having prior

thereto by pleading to the merits or otherwise, done any act from which an intention to waive the express statutory privilege as to the place of the trial which must subsequently occur, could be reasonably presumed, or which could be held to constitute a waiver in fact. The mere entering of a general appearance and filing of a demurrer to the complaint, contemporaneous with his motion, should not defeat his right. The latter act has no bearing whatever upon his right to invoke the privilege allowed him by statute and indicates no intention to waive it, because the court has full jurisdiction, and by virtue of the summons already served he is compelled to appear and plead at some time, whether the place of trial is changed or not.

Smith v. The People, supra, was a case precisely similar. In that as in this, the motion to change the place of trial and a demurrer were filed at the same time. It was there held that the court erred in denying the motion, and for that cause there was a judgment of reversal. That holding is conclusive of this case.

The second contention of plaintiff is equally unsound in our opinion. Conceding, but not deciding, as its counsel claim, that in an application of this kind a party should negative all of the code provisions whereby the place of trial need not be changed, even though the defendants were residents of, and served with process in another county, in this instance it appeared upon the face of the complaint (except as to the place where the contract was to be performed, which was covered by the affidavit in support of the motion), that the case did not come within any of the exceptions. This could properly be considered by the court, and acted upon if deemed sufficient.—*Smith v. People, supra; Campbell v. Securities Co.*, 12 Colo. App. 545. If the facts appearing

upon the face of the complaint show that the case is not one included in any of the exceptions, we see no reason either in common sense or law, why the moving party should be compelled to reiterate them in an affidavit.

Counsel for plaintiff claim, however, that this was a suit not upon a contract, but for goods sold and delivered, and therefore came within one of the exceptions of the code section. We cannot agree with them. If the suit had been against Robert F. Smith alone, seeking to recover a balance due for papers sold and delivered to him, there might possibly have been some ground for this contention. There is none, however, when the other defendants are joined with him. As respects them, there can be no question but that the suit is upon a contract,—their written contract of guaranty.

Counsel suggest that because the contract was dated at Denver, the court was authorized to conclude that the contract was to be performed in Arapahoe county, and hence that county would under the statute be a proper place of trial. A recent decision of our supreme court is directly in point to the contrary, the contract itself not specifically providing a place for its performance.—*Brewer v. Gordon*, 27 Colo. 112.

For these reasons, we think the court erred in denying the motion to change the place of trial, the case clearly coming within the provisions of the code section. A sufficient showing having been made, the court had no discretion other than to grant the motion. It had no power after it was filed, to pass upon the demurrer, or to do any act in the premises except to grant the change.

The judgment will be reversed and the cause re-

manded, with instructions to the court to transfer the cause to the proper court in Boulder county.

Reversed.

[No. 2093.]

CARYL V. KELLOGG.

Contracts—Construction—Partial Payments.

Plaintiff was employed by defendant to survey and prepare for patent certain mining claims, the compensation of \$550 to be paid in installments. The provision for the third installment was for "the amount of cost of advertising and one-half the balance of said \$550.00 after deducting amounts already paid." Held, that the third installment would be the amount of cost of advertising plus one-half of the balance of the \$550 unpaid, and not one-half of said balance less said cost.

Appeal from the County Court of Arapahoe County.

Mr. JOHN T. BOTTOM, for appellant.

Mr. LORIN S. WHITNEY, for appellee.

WILSON, P. J.

Plaintiff Kellogg, a United States deputy mineral surveyor, was employed by defendant to survey for patent a group of mining claims, and do everything necessary to secure a receiver's receipt from the proper United States land office. The amount agreed upon as compensation to be paid for the services was \$550.00, payment to be made at certain specified times during the progress of the work. The contract was in writing. Two of the stipulated partial payments, aggregating a total of \$220.00, were made, and this controversy concerns the third payment, which was under the terms of the contract to be made upon the approval of the survey by the surveyor-general. The plaintiff claimed this amount to be \$165.00, for which sum he brought suit and obtained judgment. Defendant excepted to the judg-

ment, and asked the court to correct it, deducting \$40.00 from the amount on account of advertising. The case having been originally commenced before a justice of the peace, there were no written pleadings, and so far as we can understand from the imperfect and indefinite abstract presented, the exception of defendant to the amount of the judgment and his request that it be reduced \$40.00, are based upon this one of the several clauses in the written contract specifying times and amounts of payments: "Upon approval of survey by surveyor-general, the amount of cost of advertising, and one-half the balance of said \$550.00 after deducting amounts already paid, and the remainder of the whole amount, when the case is fully prepared for final presentation at United States Land Office."

We think the contention of defendant not well founded. By the terms of the agreement as it plainly reads and as it must be construed, the defendant was to pay at that time not only the amount of the costs of advertising, but also one-half of the balance of the \$550.00 remaining after deducting the two previous payments which aggregated \$220.00. This would leave a balance of \$330.00, the one-half of which would be \$165.00. In reality it would seem that the plaintiff was then entitled to receive not only this one-half, amounting to \$165.00, but also \$40.00 additional, the cost of advertising. If, therefore, we allow the contention of defendant that the \$40.00 should first be deducted from the \$330.00, we leave a balance of \$290.00, the one-half of which would be \$145.00. This, added to the \$40.00, would make a sum total of \$185.00, instead of \$165.00, which the plaintiff sued for, and for which he obtained judgment. We do not see upon what ground the defendant can complain, if the plaintiff sued and obtained

judgment for less than he really might have done. He is certainly not prejudiced.

This seems to be the only question in the case, and the judgment will be affirmed. *Affirmed.*

[No. 2071.]

HEAD CAMP, PACIFIC JURISDICTION, WOODMEN OF THE
WORLD v. LOEHER.

1. Evidence—Confidential Communications—Physicians—Statutory Construction.

Mill's Ann. Stat., section 4824, providing that "a physician or surgeon duly authorized to practice his profession under the laws of this state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," does not include physicians practicing outside of this state, and not authorized or licensed to practice under the laws of this state, and such unauthorized physicians are not incompetent to testify to such information.

2. Evidence—Hearsay—Life Insurance—Application.

In an action against a mutual benefit insurance society upon an insurance certificate, testimony of a physician that prior to the time deceased made application for membership in defendant society he attended deceased as a physician and that he was then suffering from a certain disease, offered to contradict statements in the application, is not objectionable as hearsay testimony.

3. Same.

In an action against a mutual benefit insurance society upon a certificate of insurance where a physician residing in another state testified that prior to the date of the application of deceased for membership in defendant society he attended him as a physician, and that he was suffering from a certain disease, testimony of another witness that a short time before his death deceased told witness he had resided at the place where the physician testified he attended him, was admissible.

Appeal from the District Court of Arapahoe County.

Mr. H. N. HAYNES and Mr. CHARLES F. TEW, for appellant.

Mr. D. V. BURNS, for appellee.

WILSON, P. J.

By this suit plaintiff sought to recover upon a benefit certificate issued by the defendant society to her son, Waldemar Loeher, and payable to her in case of his death. The representations in the application for membership and in the medical examination were made express warranties, upon the faith and condition of which the certificate was issued, one of the conditions being that "If any of the statements or declarations in the application for membership, on the faith of which this certificate was issued, shall be found in any respect untrue, then in every such case, this certificate shall be null and void and of no effect."

By its answer the defendant society denied liability, because it alleged that a number of the material statements in the application and in the medical examination were untrue. In support of this defense, the defendant offered in evidence a deposition of Dr. T. A. Skillman, a physician resident at New Brunswick, New Jersey, with whom it was claimed the applicant had consulted, and by whom he had been treated about two years before the application for benefit membership in the defendant society, the application being made in Colorado, where the applicant then resided. Upon the objection of plaintiff that the testimony offered was incompetent and hearsay, all of the material portions of the deposition were excluded, and this raises about the only question in the case which needs to be determined.

The chief objection relied upon is that the witness is incompetent to testify by reason of a Colorado statute.—Gen Stats., sec. 3649; Mills' Ann. Stats., sec. 4824. The section is preceded by a preamble, which reads as follows:

"There are particular relations in which it is the policy of the law to encourage confidence, and to pre-

serve it inviolate, therefore, a person shall not be examined as a witness in the following cases." Then follows the first clause, which has reference to a husband and wife testifying for and against each other, and as to the inviolability of communications by one to the other during marriage. The second clause prohibits an attorney from testifying without the consent of his client, to any communication made by the latter to him or as to any advice given by him in the course of his professional employment. The third clause exempts clergymen and priests. The fourth clause reads as follows: "A physician or surgeon duly authorized to practice his profession under the laws of this state, shall not without the consent of his patient be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." The only controversy here is concerning the words, "duly authorized to practice his profession under the laws of this state," it being conceded that the witness was not so authorized under the laws of this state with reference to the practice of medicine existing at the time when the benefit certificate was issued, and ever since. It is urged by the plaintiff that the words should not be construed in the sense of limiting or restricting the class to which the statutory privilege applied, but rather in accord with what counsel contend was the policy and intent of the enactment as expressed in the preamble. They insist, in other words, that they should be entirely eliminated from the statute, thereby making it apply to all physicians, authorized or unauthorized to practice, licensed or unlicensed.

We do not see how under any authority or rule of construction, a court would be permitted to pursue this course in the case at bar. It is true that in construing statutes, it is a fundamental rule that courts

should endeavor to ascertain and give effect to the legislative intent, and in so doing in some cases it is permissible to read a word or words out of or into a statute. It is equally true, however, that this is not permissible where the words used are free from any ambiguity and doubt, and involve no absurdity or contradiction. In such case, the statute itself furnishes the best and controlling means of its own exposition. To hold otherwise would be for the courts to usurp legislative functions, to entirely supersede the legislative intent, and to substitute for it their own ideas of what the law should be. It is also equally a fundamental rule of construction that courts may not treat words in a statute as surplusage and reject them unless it be impossible to attribute a rational meaning or purpose to them.—*Garfield County v. Schwarz*, 13 Colo. 295.

The statute was enacted in 1883. This was the legislative session immediately succeeding the one (1881) in which the legislature first adopted the law providing regulations for the practice of medicine in this state, and prohibiting it without a party having been first authorized under its provisions. It may well be that the legislature placed these words in the later statute, with the deliberate purpose of carrying out and aiding the policy which it had adopted in the prior one. Again, as a further evidence that these words were inserted for some specific purpose, we need only refer to a preceding clause of the same section, that with reference to attorneys. There these restrictive words were not used,—the statute embracing and applying to all attorneys, whether authorized and licensed to practice law under the laws of this state or not. It seems to us that this alone would furnish strong evidence to the effect that when the legislature in the subsequent clause relating to physicians inserted

these words, it was done for a purpose, and that the words were intended to have the effect and meaning which they do have if construed at all. If the legislative intent had been as contended by counsel for plaintiff, the words would have been omitted absolutely, and it would be from bare, unsupported conjecture alone we could say that the attention of the law-making body was not called to the words or that they were inadvertently inserted, because they and all language of similar restrictive import had been expressly omitted from all of the preceding clauses. However persuasive the arguments of counsel that the law should be such as to apply even to non-resident physicians, and to those, contrary to the express terms of the statute, not authorized to practice under the laws of this state, we can only say that this court is powerless to give relief, it being impossible in our opinion to raise a doubt as to the meaning of the words and language used. It somewhat detracts, however, from the force of this reasoning of counsel, that in this state such communications were not privileged at common law, nor by statute until 1883. Before that recent period, the legislature had not awakened to the great importance of that public policy which it is claimed this statute was intended to promote. Without these words, there would be no restriction in terms upon its application to residents of the state. It would not then be required that the person, even though a resident, for whom the privilege was invoked or who was sought to be declared incompetent as a witness must be shown to have been authorized to practice as a physician or surgeon under the laws of the state. The statute so framed or construed would furnish no rule or guide by which to determine who is a physician or surgeon within its terms. To cure this defect it might again become necessary to read into it additional words in order to

prevent its being sometimes used as an instrument for the obstruction rather than the promotion of right and justice. The provisions of the statute as it now reads are clear, intelligible and easily understood, cannot be said to be in any sense unreasonable or absurd, are subversive of no legal private rights, and are not inconsistent with themselves or with any other law. Under such circumstances, however fully we might agree with counsel that they should be extended and broadened, the courts are without power in that regard. The remedy is with the legislature alone.—*Hause v. Rose*, 6 Colo. 26.

That no state has a similar law—one containing the restrictive words under consideration—is not an argument that they were improvidently used, and that the courts of this state should disregard them. Rather, if the fact has any bearing upon the question at all, it would tend to support the contention that they were inserted advisedly, and for a specific purpose. Dr. Skillman was not rendered incompetent to testify as a witness because of this statute.

The objection that his testimony was hearsay is equally untenable. This, we presume, is based upon the contention that this action being between the beneficiary and the society, the former could not be bound by the statements or declarations of the applicant prior to and not contained in his application. *Knights of Honor v. Wollschlager*, 22 Colo. 213, upon which plaintiff relies, applies only to the declarations of the assured offered to contradict statements in the application. That question is not presented by the testimony of Dr. Skillman. It was sought to prove by him not declarations of the deceased, but the positive fact that prior to the time of his application, he attended the deceased as a physician, and that he was then suffering from a certain disease. We think that

the court erred in excluding the testimony of Dr. Skillman.

The defendant also offered as a witness Mr. Niederlitz, a member and officer of the defendant camp, who testified over the objection of plaintiff that the deceased told him in a conversation had with him a short time previous to his death, that before coming to Denver, he had resided in New Brunswick, New Jersey. Plaintiff has not assigned cross-error, but as the cause must be reversed and remanded for a new trial, the question as to the competency of this testimony will undoubtedly again arise, and for that reason, we think proper to pass upon it. In our opinion, the testimony was clearly admissible. It was not sought thereby to contradict any statement in the application by a subsequent declaration of the assured, hence it does not come within the principle laid down in the Wollschlager case. That it might possibly prove to be a link in a chain of evidence whereby the untruthfulness of these statements might be shown, is too remote an objection to justify its exclusion.

The judgment will be reversed, and the cause remanded for a new trial in accordance with the views here expressed.

Reversed.

[No. 2022.]

BLITZ ET AL. V. MORAN.

Mortgages—Judicial Foreclosure—Sales.

In a judicial foreclosure of a mortgage the sheriff alone is authorized to execute the decree of foreclosure and sell the land, and it is error for the court to appoint a commissioner, other than the sheriff, to make such foreclosure sale, where such appointment is at the time objected to.

Appeal from the District Court of Arapahoe County.

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d19 33

Mr. T. J. O'DONNELL and Mr. MILTON SMITH, for appellants.

MESSRS. BENEDICT & PHELPS and Mr. HORACE PHELPS, for appellee.

Mr. JOSHUA GROZIER, MESSRS. WOLCOTT, VAILE & WATERMAN, Mr. WM. N. VAILE, Mr. WM. W. FIELD, Mr. JAMES C. STARKWEATHER, Mr. EDWARD L. SHANNON, Mr. THOMAS H. HOOD, *amici curiae*.

THOMSON, J.

On February 6, 1894, Simon Blitz made his promissory note to Amedee D. Moran for \$3,000, due in five years, with interest at 8 per cent. per annum, payable semi-annually; and, to secure the payment of the note and interest, executed to Charles Hallowell a deed of trust conveying to him, as trustee, certain real estate which it described. The deed of trust empowered the trustee, in case of default by the maker in the payment of the note, or interest, to sell the property in the manner prescribed in the instrument, and execute a deed to the purchaser, and, after payment of the expenses of the sale, to apply the proceeds upon the note and interest. The trust deed also provided that in case of default in the payment of any installment of interest, the whole sum secured, and all accrued interest, should, at the option of the legal holder, become at once due and payable.

Afterwards, on the 14th day of December, 1896, Simon S. Blitz executed another deed of trust to Bernard Beer, as trustee, to secure the payment of a promissory note for \$4,444, made by him and payable to Louis Blitz on demand, with interest at 8 per cent. per annum.

Default was made by Simon S. Blitz in the payment of the interest due Moran on the 6th day of February, 1898, and the latter elected to declare the

entire indebtedness due and payable, and thereupon brought this suit for the foreclosure of the trust deed. Beer, as trustee, and Louis Blitz, the beneficiary in the second deed of trust, were made parties defendant. The execution of that deed and the fact that it was junior and subordinate to the other, were alleged, and the foreclosure of the equity of redemption of Louis Blitz prayed.

The defendants, Beer and Louis Blitz, answered. Beer was merely the trustee, and therefore without interest, and we do not deem further notice of his answer necessary. The answer of Louis Blitz, after denying some of the facts averred in the complaint, admitted the execution of both deeds of trust, and prayed that, in virtue of his right of redemption, he be adjudged entitled to such surplus of the proceeds of the sale as might remain after payment of the amount due the plaintiff.

The hearing resulted in a decree, out of which arises the only important question in the case. The decree, after finding the facts and pronouncing judgment in favor of the plaintiff, provided for the foreclosure of the trust deed executed to Hallowell for the benefit of the plaintiff, and ordered that unless Simon S. Blitz should, within fifteen days, pay the amount of the judgment and costs, the property conveyed by the deed should be sold and the proceeds applied to the payment of the costs of the suit, the costs and expenses of the sale and the satisfaction of the judgment, the surplus to be deposited in court; and William Ferris, Jr., was appointed a commissioner to make the sale and carry the provisions of the decree into effect.

A number of exceptions were taken to the decree in which we are unable to discover any merit, and which, therefore, we dismiss from consideration. But specific objection was made to the order appointing

Mr. Ferris a commissioner to make the sale of the property, for the reason that such sale could be made only by the sheriff, to the overruling of which exception was duly taken; and this exception brings up a question which, we think, demands investigation.

Prior to the adoption of the Code of Civil Procedure, in 1877, the ancient distinctions between law and equity, both as to jurisdiction and practice, were carefully preserved. On October 24, 1861, an act of the territorial legislature was approved entitled "An act Concerning Practice in Chancery," the first section of which reads as follows:

"The several district courts of this territory, in all causes of which they may have jurisdiction as courts of chancery, shall have power to proceed therein according to the mode hereinafter prescribed; and where no provision is made by this chapter, according to the general usage and practice of courts of equity or agreeably to such rules as may be established by the said courts in that behalf."—Territorial Laws 1861, p. 181.

This act is designated as chapter 13 of the Revised Statutes of 1868, and it remained the law until the adoption of the code. By section 48 of the act the several district courts of the territory were empowered to appoint in each county, one, or, in their discretion, two, masters in chancery, whose powers and duties were enumerated in section 50. Section 46 of the same act provided that when there should be no master in chancery, or commissioner to execute a decree, the same might be carried into effect by execution or final process, according to the nature of the case, directed to the sheriff or other officer of the proper county. By section 43 commissioners were appointed by the court for the purpose of carrying into effect decrees directing the execution of deeds or other writings. Masters in chancery were, by section

50, authorized to perform the duties which, by the practice of courts of chancery, appertained to their office.

Under the old system a master in chancery was an officer of the court of chancery, and acted as an assistant to the chancellor. Among his duties were the performance of special ministerial acts directed by the court, such as making sales of property in pursuance of decree. His functions as an officer of the court of chancery were analogous to those of the sheriff as an officer of the law; the latter executing the process of the law and the former the orders of the court of which he was an officer.—*McLain v. The People*, 85 Ill. 205; *Ryan & Nevins v. Dox*, 25 Barb. 440; *Morton v. Sloan*, 11 Hump. 278; *Williamson v. Berry*, 8 How. 495.

The adoption of the code worked a radical and entire change in our judicial system. Courts of chancery and courts of law, as they were previously constituted, ceased to exist. In *Blatchley v. Coles*, 6 Colo. 82, Mr. Justice Elbert said: "The code abolished all distinctions between legal and equitable actions and substituted therefor one action by complaint. For our common-law practice and our chancery practice it substituted a code procedure." With the passing of the court of chancery passed also the office of master in chancery; and sales of property under decree must now be made by some other officer. The following is section 8 of article 5 of an act entitled "An Act Relating to Counties and County Officers," approved November 6, 1861:

"The sheriff, in person or by his under-sheriff or deputy, shall serve and execute, according to law, all processes, writs, precepts and orders issued or made by lawful authority and to him directed, and shall attend upon the several courts of record held in his county." The foregoing provision has never been

changed and is still the law in this state.—1 Mills' Ann. Stats., sec. 855.

The abolition of the court of chancery carried with it the special offices peculiar to that court, and left the sheriff as the only officer to whom the processes, writs and orders of courts may be directed. But even while the court of chancery was in existence its orders for the sale of real estate might be directed to the sheriff. As we have seen, by the terms of section 46 of the chancery act, decrees of the court of chancery might, in the absence of a master or commissioner, be carried into effect by final process directed to the sheriff. In executing decrees for the sale of property, the sheriff performed the duties of the master. But the office of master in chancery no longer exists, and the only officer now authorized by the statute to execute processes, writs, precepts and orders is the sheriff; or, in certain contingencies, the coroner acting as sheriff.

In this connection some objections are suggested, which may properly be noticed now.

1. It is said that the sheriff has no authority outside of his county; therefore, when a foreclosure embraces land lying in two counties, if the sale can be made only by the sheriff, an order of sale must issue to the sheriff of each county, thus necessitating two sales. This difficulty does not seem to have occurred to the law-makers of 1861, for they gave the sheriff equal power with a master in chancery in executing decrees of sale rendered by courts in counties where there was no master. By virtue of section 46 of the chancery act, whatever a master might do, the sheriff might do, and if the master could sell land in different counties, so could the sheriff. And under the present practice, the suggested difficulty has no existence. As we have seen, it is the duty of the sheriff to execute all orders issued or made by lawful authority, and to him

directed. Section 25 of the code provides that, in case of the foreclosure of a mortgage, where land is situated partly in one county and partly in another, the plaintiff shall bring his action in the county where the greater portion is situated, and that county shall be the proper county for trial. Now if the court may decree the foreclosure of a mortgage notwithstanding the fact that the land lies in two counties, as it is the duty of the sheriff to execute lawful orders directed to him, surely he would have the power to execute an order of sale issued to him on the foreclosure decree.

2. In the chapter concerning judgments and executions it is provided that land sold under foreclosure decree may be redeemed in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at law; and that in case of such redemption, it shall be the duty of "the purchaser, sheriff, *master in chancery*, or other officer or person" from whom redemption takes place to execute an instrument in writing evidencing the redemption, etc.—Mills' Ann. Stats., secs. 2556, 2557. To redeem from a sale made by virtue of an execution issued on a judgment at law the redemption money must be paid to "the purchaser, sheriff or other officer," who sold the land.—2 Mills' Ann. Stats., sec. 2547. The suggestion is that the authority of a master in chancery, or person other than an officer, to sell land under a decree of foreclosure, is recognized in the foregoing sections 2556 and 2557. But those sections were enacted when the court of chancery was in existence; they had in view the inherent powers of that court, and its ancient usages and practice; but in so far as they were intended to be applicable peculiarly to the old proceedings in chancery, they are now obsolete. They have never been repealed, and except as they constitute part of a system which has

been abolished, they are still in force. The provision that land sold under decree of foreclosure shall be redeemed in the manner prescribed for the redemption of land sold by virtue of execution issued on a judgment at law, is not inconsistent with the present mode of procedure, and remains the law. Disregarding the reference to the machinery peculiar to a court of chancery, we find that the redemption money must be paid to the purchaser, sheriff or other officer who sold the land. In the statutory provisions relating to the sale of land on execution, from the issuance of the execution down to the final conveyance to the purchaser, the words "sheriff or other officer" are constantly used; and by reference to sections 2583 and 2585 of Mills' Statutes, it will be seen that the other officer is the coroner. The land must be sold by the sheriff or coroner, else the redemption law, where payment is not made to the purchaser, is nugatory.

3. Section 11 of article 6 of our constitution provides as follows: "The district courts shall have original jurisdiction of all cases, both at law and in equity." The foregoing provision is made the subject of an elaborate argument. It is said that by conferring jurisdiction in all cases in equity upon the district courts, the constitution invested those courts with all the powers inherent in, and incident to, courts of equity, among which is the power to appoint officers to carry out their decrees; and that the legislature is without authority to adopt a code of practice which would divest them of any of their inherent powers. We are not sure that we understand exactly what counsel mean; but we assume that they intend to say that by virtue of the foregoing constitutional provision, all the powers which the court of chancery gathered to, and consolidated in, itself, during the long period of evolution of English jurisprudence, inhere in our district courts. We think such

conclusion entirely unwarranted. Jurisdiction is conferred by the constitution, but concerning the manner of its exercise, nothing is said. In cases of equitable cognizance, the district court may adjudicate and determine the claims of parties before it, and decree the proper relief; and, in doing so, it exercises the jurisdiction which the constitution confers. The constitution simply invests the court with the jurisdiction; it nowhere prescribes the procedure to be resorted to for the purpose of securing the desired relief, or provides the machinery by means of which the court's decree may be enforced. Section 1 of article 5 of the constitution vests the legislative power in the general assembly, and its authority to enact legislation is limited only by the provisions of the constitution. While it may not impair the constitutional jurisdiction of the court, it is not inhibited from providing a mode of procedure in conformity with which the jurisdiction may be made effective. The general assembly has given us a code of practice, which nowhere undertakes to disturb the jurisdiction vested by the constitution, but which does prescribe the method by which the jurisdiction may be asserted. Our courts have no prescriptive powers. Their powers are derived solely from the constitution and the statutes, and their inherent powers are those only which are necessary to render their expressed powers effective, and enable them to exercise their jurisdiction. Inasmuch as the law has provided an officer to execute their processes, writs and orders, the appointment by them of another officer to perform the same duty, is not necessary for the purpose of rendering any expressed power effective, and is, therefore, outside of any inherent power.

Thus far we have confined ourselves to an inquiry into the effect of the displacement of the old judicial system by the new, upon the question under

consideration. But in the chapter of the code concerning the foreclosure of mortgages, we find an expression which, in our opinion, is conclusive of the legislative intent. We quote the following from the first section of that chapter:

"In actions for the foreclosure of mortgages, the court shall have the power, by its judgment, to direct the sale of the encumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale, and the amount due to the plaintiff; and if it appears from *the sheriff's return* that the proceeds are insufficient and a balance still remains due, judgment shall be docketed for such balance against the defendant, or defendants, personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued."

It is true, as suggested, that the chapter concerning foreclosure nowhere specially provides that sales under decrees of foreclosure, shall be made by the sheriff. But, as we have seen, at the time of the adoption of the code, it was, by general statute, the duty of the sheriff to serve and execute all processes, precepts, writs and orders, issued by lawful authority, and directed to him; and a repetition in the code of the provisions of the general statute, would have added nothing to the authority which the sheriff already possessed. The code provision we have quoted assumes a sale by the sheriff. That there can be no return of the sale but his, is taken for granted; and unless he makes the sale, he cannot make the return. Nowhere in the code is a court authorized to appoint a master in chancery, or a person by any other name, to execute orders of sale issued upon decrees of foreclosure; and that the legislature understood and intended that such orders

should be executed only by the sheriff, we think appears very clearly in the language we have quoted.

Section 252 of the present code corresponds to section 227 of the original code of 1877, which commenced as follows: "There shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter." The remainder of that section is the present section 252. In 1879 section 229 was repealed and re-enacted, omitting the preface we have quoted. Counsel seem to attach some special significance to the fact that the preface was not re-enacted. They do not give us their opinion of the effect which that preface was intended to have upon the remainder of the chapter; but we infer that they regard it as having been a mandatory requirement that all sales under decrees of foreclosure should be made by the sheriff, for they say: "There can be no doubt but that such mandatory provisions were thus expressly repealed owing to the inconvenience resulting, or which it was reasonably anticipated would result therefrom. In other words, the plain and obvious intent of the legislature in 1879, in striking out the mandatory provisions of section 229, was to enable parties, if they so desired, to pursue the former practice in foreclosure cases, that is to say, to allow them, if they so desired, to have a special master or commissioner appointed to make the sale, to have the sale reported to the court, and to obtain a confirmation of the same." Proceeding further, counsel say that the language concerning the sheriff's return relates entirely to a deficiency judgment; and that it was intended only to enable the same court, in the same action, to decree the foreclosure of the mortgage and enter a judgment for the deficiency. It appears from the foregoing, that coun-

sel's construction of the section is that where a plaintiff desires a deficiency judgment in the foreclosure suit, he must cause the sale to be made by the sheriff; but that when he does not, he may have the decree executed by a master or commissioner.

Counsel's opinion of the effect of what they term the "mandatory provision," and of the intention of the legislature in its abrogation, is widely at variance with our own. The provision was that there should be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage, which action should be in accordance with the chapter of which the provision was a part. Section 229 of the code of 1877 was borrowed in its entirety from the California code; it is an exact copy of section 246 of the original California Practice Act—section 726, Harston's Practice; and, speaking with reference to the provision in question, the supreme court of that state, in *Cormerais v. Genella*, 22 Calif. 116, said that it related entirely to the action, and not to the form of judgment which the court might render in the action. There is nothing in its language to warrant a supposition that it was intended to have any reference to the contents of the decree, or the sale of the land. But we think it was an unnecessary provision, and that the force and effect of the section are precisely the same without it as with it. The following is the first section of the code:

"The distinction between actions at law and suits in equity, and the distinct forms of actions and suits heretofore existing are abolished, and there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act."

This was also the first section of the code of 1877. The preface to section 229, was merely a restatement in different language of what was said in section 1. Its application was limited to the foreclosure of mortgages; but section 1 was applicable to foreclosures equally with other civil actions; the chapter concerning foreclosures was part of the code, and by virtue of the first section, actions for foreclosure must have been instituted and prosecuted in accordance with the provisions of that chapter. And we think it probable that the reason for the repeal of the introductory provision was that it was unnecessary. Neither is there any warrant for the forced and unnatural construction that would inject into section 252, a provision which, if the plaintiff desires a deficiency judgment, requires him to have the land sold by the sheriff, but otherwise permits the appointment of a master or commissioner to make the sale. The language used in relation to the sheriff's return, and the connection in which it is used, make it evident to us that the legislature contemplated and intended a sale by the sheriff in every instance, and upon his return showing an unsatisfied balance, the docketing of a judgment for such balance against the defendant personally liable for the debt.—See *Leviston v. Swan*, 33 Calif. 480; *Cormerais v. Genella*, *supra*.

The rule which obtains since the adoption of the code, in relation to causes of equitable cognizance, is thus stated by Mr. Justice Elbert in *Blatchley v. Coles*, 6 Colo. 82:

“Undoubtedly the rules and principles of equity jurisprudence still obtain and apply in the adjudication of causes in their nature equitable, but equity practice, *eo nomine*, no longer exists, and can no longer be appealed to, except, perhaps, in matters upon which the code is silent.”

In relation to the proceedings which follow a de-

cree of foreclosure, the code is not silent. They must, therefore, conform to its provisions, the former practice having been abrogated. In the opinion delivered in *Nevin v. Lulu & White S. M. Co.*, 10 Colo. 357, the following occurs:

“The foreclosure and sale must be a foreclosure and sale provided for in section 234 of the code.” The section referred to was section 234 of the code of 1883, and is section 252 of the present code. The decision in that case was rendered long after the repeal of what counsel term the “mandatory provision” of section 229 of the code of 1877, and yet the court says, not that plaintiff may have a decree and sale in accordance with the practice in chancery if he so desires, but that the foreclosure *must* be the foreclosure and sale provided for by the code.

We are cited to *Denver B. & M. Co. v. McAllister*, 6 Colo. 261, as authority for the contention that the court may appoint a trustee, or a special master in chancery, to make sale under the decree. In that case a judicial foreclosure was sought of a trust deed, the plaintiff treating it as a mortgage. There was a decree of foreclosure. The only question in the case related to the mortgagor's statutory right to redeem, which had been denied by the lower court. The supreme court held that it was within the power of the court, under a proper bill, to order a sale of the property in accordance with the terms of the trust deed, either by the trustee named in the deed, or by another appointed by the court, from which sale there was, by virtue of the statute, no redemption; or, treating the trust deed as a mortgage, to decree a foreclosure subject to the statutory right of redemption. It was only where the remedy provided by the trust deed was proposed to be enforced, that is, where specific performance of the provisions of the trust deed was the object of the suit, that the court held that a trustee

might be appointed to make the sale; but in relation to the judicial foreclosure sought, the court said:

"The complainant having waived his right of sale under the terms and conditions of the trust deed, under which no equity of redemption would have attached, and having, by the prayer of his bill, asked that the instrument be treated and foreclosed as a mortgage, and that the usual decree be made for the sale of said mortgaged premises, the decree should have been the usual statutory decree, giving a right of redemption."

The decree was reversed with direction to the court below to enter a decree "for the sale of the property in accordance with the usual statutory mode for the sale of mortgaged premises under decrees of foreclosure." It will be observed that the direction was to enter a decree, not in accordance with chancery practice, but in accordance with the statute. It appears from the opinion that by the decree from which the appeal was taken, a special master in chancery was appointed to make the sale, and no comment upon the appointment was made in the opinion. But there was no objection to the appointment. Its validity or regularity was not in question, and there was no reason why it should be noticed. We do not think the case an authority for counsel's contention.

Before proceeding to the discussion of another question raised by counsel, we shall notice an additional authority relied on in behalf of the appellee. The following was the case of *R. R. Co. v. Sibert*, 97 Ala. 393, as it is outlined in the opinion: The Rome and Decatur Railroad Company was incorporated both in Georgia and Alabama. The purpose was to construct and operate a railroad from Rome in Georgia to Decatur in Alabama. The corporation issued its bonds and secured them by mortgage. A bill was

filed in Georgia and an auxiliary bill in Alabama, the purpose of which was to have the railroad placed in the hands of a receiver. Dorsey was appointed receiver, first by the Georgia court, and afterwards by the Alabama court. One of the defendants, The American Loan and Trust Company, with its answer, in each case, filed its cross-bill, praying the foreclosure of the mortgage and the sale of the railroad for the payment of the mortgage indebtedness. Foreclosure was decreed first in Georgia, and then in Alabama. The decree in each case was entered by consent; and by consent it was ordered that the sale be made in New York, by Dorsey, the receiver. After the decree, the sale of the property, and the confirmation of the sale, questions arose as to the distribution of the funds, and it was those questions only which were involved in the appeal. One of those questions was raised by the register of the court; and it is the decision of that question which counsel contend is applicable to the case at bar. The code of Alabama directed as follows: "When any property is ordered to be sold by the decree of any chancery court for the satisfaction of any debt secured by any mortgage or deed of trust, such sale shall, in all cases, be made by the register of the court ordering the same." The register of the Alabama court claimed the statutory commissions for making the sale. The supreme court, after calling attention to the fact that the decree was entered and the sale made by consent; that the sale had been confirmed; and that the register performed no service whatever in connection with the sale, or the report of the sale; and after commenting upon the difficulty in the way of adhering to the letter of the statute where the land was to be sold in a lump under two decrees rendered in different states in which the other state took the lead, denied the register's claim, saying that the

statute fixing his commission had been held to be the subject of strict construction; that it allowed commissions only for making sales, and that the register had made no sale. The sale was adjudged valid; but the court said: "We need not and do not decide absolutely whether or not the register can enforce his own selection and appointment to make the sales provided for in section 3600 of the code. If he can, it would seem the proper time to move in the matter would be when the decree ordering the sale is pronounced."

What there is in the foregoing opinion to lend countenance to the appellee's contention, we confess ourselves unable to see. All parties to the proceeding acquiesced in the decree, the sale, and the confirmation of the sale. No objection to what was done was made by any person interested. The only complaint came from a stranger, after the sale had been confirmed, who claimed that he had, by virtue of his office, the legal right to make the sale, and was entitled to the commissions allowed for the sale, notwithstanding it was made by another. He offered no objection to any of the proceedings which culminated in the confirmation of the sale. The court, in its opinion, after giving a history of the proceeding, commencing with the appointment of the receiver, and noticing the cross-bill for foreclosure, the decree, the sale and the confirmation of the same, said: "No question is raised in the present appeal on any of the matters noted above." Incidentally, although no person was questioning it, the court declared the sale legally valid; but it denied the register's claim simply and only because he had done nothing to earn his commission; and it declined to decide that he might not have compelled his appointment to make the sale if he had moved at the proper time. The only question before the court was, whether, without actually

making the sale, he was entitled to the commission; and a decision of that question can have no possible relation to the state of facts appearing in the record we are now considering.

But it is said that an authoritative decision that sales under decrees of foreclosure can be made only by the sheriff, will be disastrous in its effect, in that it will disrupt and destroy a large number of titles acquired through foreclosure sales made, in accordance with decree, by persons other than the sheriff, specially appointed for the purpose. The theory is that if the law requires such sales to be made by the sheriff, the appointment by the court of a special master or commissioner to make them, is absolutely void, and that therefore his acts under the appointment are nugatory. If it were true that under a practice long continued and unquestioned, titles have vested, which a decision at this late day against the practice would nullify, the situation would demand the most earnest attention and consideration. But we think that counsel's apprehensions as to the effect of a decision that the sheriff is the proper officer to execute a decree of foreclosure, are groundless. Let us see whether there is any cause for alarm.

Where a court has jurisdiction of the parties and of the subject-matter of the suit, its judgment or decree, within the case made by the pleadings, is valid. It may be erroneous, but it is not void. It cannot be attacked collaterally, and it can be attacked directly only in the manner and within the time prescribed by law for obtaining its review by the proper tribunal constituted for the correction of errors. If the party against whom the judgment or decree is taken, suffers the appointed time to elapse without moving towards securing its reversal, he is bound by it no matter how erroneous it may be, and he is powerless to resist its enforcement. In actions for

foreclosure, the order that the property be sold, whether by the sheriff, or by a master or commissioner appointed for the purpose, is part of the decree. If the order be that a person other than the sheriff make the sale, it is valid, because the court, having jurisdiction of the parties and the subject-matter, has the power to make it. In *Eberville v. Leadville Tunneling, Mining & Drainage Co.*, 28 Colo. 241, 64 Pac. 200—an action of ejectment—our supreme court, speaking through Chief Justice Campbell, said: “In deraigning title, plaintiff relied upon a deed made by a court commissioner, whose authority was derived from a decree of the district court of Lake county, rendered in a cause therein pending. The decree upon its face is regular, and shows that the court had jurisdiction of the subject-matter and of the parties to the action, and power to render the particular judgment in that case.” In *Dabney v. Manning*, 3 Hammond (Ohio) 321, the lower court, in a partition suit, directed the land sold by a person other than the sheriff. The law required the sale to be made by that officer. The executrix of the testator brought trespass against the purchasers at the sale, who had taken possession under their deed. Upon the question of the effect of the judgment, and of the proceedings under it, while it remained in force, the court spoke as follows:

“It is urged, that by law the courts are, in case of a sale being ordered, directed to require that the sale be made by the sheriff, and that, in this case, they appointed another person to make it. But this error could not have the consequence of taking away their jurisdiction, nor of rendering the sale void. They were authorized to direct a sale by one person, and they directed a sale by another. There is no just analogy between such a case, and one where the court adjudged that to be done, which the nature of the

action does not warrant, as adjudging that a defendant make a conveyance for land, or receive a beating in a personal action."

Before leaving this case we think it worth while to observe that it appears from the statement preceding the opinion that after the sale and conveyance, the proceedings in partition were taken up by writ of error, and the order directing the sale reversed; and that thereupon the defendants abandoned the possession.

Titles acquired through judgments merely erroneous, in which the parties have acquiesced, are valid. A deed made by a commissioner, erroneously appointed by the court in a foreclosure proceeding to make sale of the property, no steps having been taken to secure a reversal of the decree, conveys the title of the party against whom the decree was rendered, and that title is unaffected by the error in the decree.

In this case the court had complete jurisdiction, and the only error consists in the appointment of a commisisoner to execute the decree. All else is regular. The decree will therefore be reversed only as to such appointment, and the cause will be remanded to the district court with instruction to modify the decree by directing the duties which it devolves upon the commissioner to be performed by the sheriff.

Reversed.

[No. 2019.]

HAINES V. CHRISTIE ET AL.

1. Appellate Practice—Right Judgment upon Wrong Reasons.

If a judgment is right it will not be reversed because it is based upon wrong reasons.

2. Estates of Decedents—Executors—Removal.

Where an executor of an estate is indebted to the estate and denies the indebtedness and refuses to account to the estate

for the money he owes it, he is justly chargeable with mismanagement, and should be removed.

Appeal from the District Court of Arapahoe County.

MR. CAESAR A. ROBERTS, for appellant.

MR. AMOS STECK and Mr. F. VAN NORMAN, for appellee.

THOMSON, J.

This proceeding was instituted in the county court of Arapahoe county to effect the removal of Sidney P. Haines as executor of the last will and testament of his mother, Diadamia Haines, deceased, and the appointment of a proper person as administrator with the will annexed. The petitioner was one of the heirs of Diadamia Haines. The petition charged that the executor was indebted to the estate in a sum of money very largely in excess of his distributive share, of which indebtedness he offered no settlement.

The executor answered denying any indebtedness whatever, and saying that the supposed debt was only a nominal one, and was placed at the sum of \$12,443.14 to preserve the equities existing between the heirs if a resettlement of the estate should be found necessary. The residue of the answer is voluminous, but it consists mostly of averments in support of the foregoing statement, and reasons why the respondent should not be compelled to pay anything to the estate on account of the alleged indebtedness.

The judge of the county court having been of counsel for some of the parties, the case was transferred to the district court of the same county, by whose order it was referred to Sidney H. Dent to take testimony and report. It appears from the report of the referee that the executor was indebted to the estate on a promissory note made by him to the testa-

trix on the 20th day of March, 1889, for \$10,000, due in two years, with interest at eight per cent per annum; on which, after deducting certain payments, there was due November 5, 1898, the sum of \$15,343.78; and that he was also indebted to the estate on book account, in the sum of \$2,447.55. It appears from the executor's answer, and from his testimony in the cause, which was in line with his answer, that he did not propose to account to the estate for that money, or any of it. It is true, as suggested by counsel, that it nowhere appears that the plaintiff ever, in terms, said that he would not pay what was due from him; but he denied that he owed anything, and, ordinarily, it is not to be supposed that one intends to pay what he does not owe. Practically, the difference between a denial of a debt and a refusal to pay it, is not very obvious.

The district court sustained some objections to the referee's report, but in the main approved it, and among the findings approved, was that fixing the indebtedness of the plaintiff to the estate. The cause was returned to the county court with instruction to enter an order removing the executor, and revoking his letters testamentary. It is objected that the court, in reaching its conclusion, took into consideration transactions by which the defendant's conduct, as executor, could not be affected; but we are concerned only with the judgment which was rendered. If that was right, it is immaterial what were the particular reasons upon which it was based. Nor do we regard the conduct of the other heirs or devisees towards the executor, or the estate, however reprehensible it may have been, as having any bearing upon the question whether the executor properly managed the estate. There was evidence to sustain the finding concerning the executor's indebtedness to the estate, and we are concluded by the finding. In behalf of the defend-

ant, we are referred to the opinion in the case of *Haines v. Christie*, recently decided by our supreme court (28 Colo. 502). So far as the question involved here is concerned, we are unable to see what the defendant finds in that opinion favorable to himself. The action was for an accounting between the executor and the other heirs and devisees. The executor claimed there as here that the note he had given did not represent an indebtedness to the estate, and on the question of indebtedness, the decision of the supreme court was directly against him.

It is provided by section 4719, Mills' Ann. Stats., that letters testamentary, or of administration, may be revoked upon a number of grounds, among which is mismanagement of the estate. If an executor or administrator should refuse to collect debts due to the estate from others, he would be justly chargeable with mismanagement; and, surely, his refusal to account to the estate for money owing to it by himself, cannot be characterized by any milder term.—See *Miller v. Hider*, 9 Colo. App. 50.

Let the judgment be affirmed.

Affirmed.

[No. 2336.]

THE CRISSEY & FOWLER LUMBER COMPANY ET AL. V.
THE DENVER & RIO GRANDE RAILROAD
COMPANY ET AL.

17	275
17	402
18	491
17	275
378	300
388	355

1. Pleading—Separate Counts.

The duplicate statement of the same cause of action and the same facts in different counts is usually bad pleading, but a party has a right to plead and prove all the facts upon which his rights depend, and where separate counts, although alleging but a single cause of action, are based upon different statements of fact, the separate statements being alleged for the purpose of meeting the exigencies of the proofs, the pleader should not be deprived of the privilege of proving any facts upon which he bases his right of recovery by compelling him to elect upon which count he will proceed.

2. Same—Railroads—Negligence—Damage by Fire—Statutory and Common-Law Liability.

In an action against a railroad company to recover damages for property destroyed by fire, where plaintiff in one count alleged a statutory liability without reference to the question of negligence, and in another count alleged a common-law liability based wholly upon defendant's negligence, the complaint stated two distinct causes of action, and it was prejudicial error to compel plaintiff to elect upon which count he would proceed, and to strike the other count from the complaint.

3. Pleading—Separate Counts—Railroads—Negligence—Damage by Fire.

In an action against a railroad company to recover damages for property destroyed by fire, the complaint contained one count predicated solely upon the defendant's negligence in causing and setting out a fire upon its right of way, and in and about its depot and platform, and in negligently causing and permitting it to escape from its right of way to plaintiff's property. Another count charged a liability for the results of fire caused in the operation of defendant's line of road, and specified various alleged negligent acts in such operation, particularly the dangerous condition of the right of way at the place where the fire originated by permitting inflammable and combustible material to accumulate thereon, by which the fire was communicated to plaintiff's property, and the negligent construction of defendant's depot and platform, and a failure to provide and maintain suitable appliances to extinguish fire. Another count alleged the negligent placing and leaving of a car of powder on defendant's tracks in its yards in violation of a city ordinance, and the negligent failure to remove the car of powder from its exposed position when the fire originated, whereby the firemen of the city were deterred and prevented from extinguishing the fire. Held, that the different counts are not repetitions of the same facts so as to be obnoxious to the code provision prohibiting unnecessary repetition, and that it was prejudicial error to require plaintiff to elect one count upon which to proceed and to strike the others from the complaint.

4. Same—Statutory and Common-Law Liability.

In an action against a railroad company to recover damages for property destroyed by fire where the complaint alleged a statutory liability and a common-law liability in separate counts, and plaintiff was compelled to elect upon which count to proceed, and having elected to proceed upon the common-law count was permitted to amend it so as to include the allegations of a

statutory liability, a ruling of the court restricting plaintiff to the common-law remedy was prejudicial error.

5. Railroads—Negligence—Damage by Fire—Evidence.

In an action against a railroad company to recover damages for property destroyed by fire where, in addition to the allegation of negligence in operating the road and starting the fire, plaintiff alleged negligence in permitting inflammable and combustible material to accumulate and remain upon the right of way, whereby the fire was communicated to plaintiff's property, and during several days of the trial plaintiff was not permitted to introduce any evidence as to the dangerous condition of the right of way, although such testimony was offered, the court ruling that plaintiff was restricted in its right of recovery to a showing of negligence in the defective construction or careless handling of defendant's locomotives, such ruling of the court was prejudicial error, and its prejudicial effect was not cured by the court subsequently ruling otherwise and permitting the evidence to be introduced.

6 Same.

In an action against a railroad company to recover damages for property destroyed by fire, testimony as to the condition of an engine belonging to defendant, and which was shown to have passed on the track close to the place where the fire originated a few minutes before its discovery, by a witness who examined the engine a week or two weeks after the fire, was admissible, and its exclusion was error.

7. Same.

In an action against a railroad company to recover damages for property destroyed by fire, where the only engine that could have set the fire was identified, evidence of the setting out of fires at other times and places by other engines belonging to defendant was properly excluded.

8. Insurance—Subrogation—Statutory Liability.

Where property which is insured is destroyed by fire under such circumstances that the owner has an action for damage against the person causing the fire, and the owner collects the insurance, the insurance company may be subrogated to the right of the owner to an action against the person responsible for the fire, whether the right of action be statutory or at common law, but where the action is statutory it must be brought in the name of the owner.

9. Railroads—Negligence—Damage by Fire—Evidence.

In an action against a railroad company to recover damages for property destroyed by fire, the fact of the origin of the fire

should be established like any other material fact in the case. The jury within certain limits may be permitted to infer the fact upon circumstances proved, but such proof should be amply sufficient to rebut the probability of the fire having originated in any other way, considering the facts, circumstances and conditions of the particular case, as disclosed by the evidence.

Appeal from the District Court of El Paso County.

Mr. SYLVESTER G. WILLIAMS, Mr. R. W. BARGER and Mr. GEORGE GARDNER, for appellants.

MESSRS. WOLCOTT & VAILE and Mr. WILLIAM W. FIELD, for appellee, The Denver & Rio Grande Railroad Company.

WILSON, P. J.

This suit grew out of a fire at Colorado Springs on October 1, 1898, which destroyed a large amount of property. Among other victims was The Crissey & Fowler Lumber Company, who, it is alleged, lost a large amount of lumber and building materials then being in a lumber yard maintained by them, lying not far distant from the tracks of the defendant railroad company. It is claimed that the fire originated in the freight yards of the defendant railroad company at or about its freight depot, through the negligence of said defendant, and the plaintiff seeks to make it liable for the loss incurred. The property of the lumber company was partially insured. The several amounts of this insurance having been paid, the insurers so paying claim to be subrogated to the extent of such payments to the rights and claims of the lumber company against the defendant railroad company, if any, and hence are made coplaintiffs with the lumber company, the owner of the property destroyed.

The complaint sets out the cause or causes of action in four counts. The first count proceeds ex-

clusively upon the theory of statutory liability. It charges a liability independent of any question of negligence, alleging that the fire which occasioned plaintiff's loss was set out or caused by the defendant railroad company in the operation of its line of railroad. It is predicated upon what is generally known as the railroad fire statute, which reads as follows: "Every railroad corporation operating its line of railroad or any part thereof shall be liable for all damages by fire that is set out or caused by operating its line or any part thereof, and such damages may be recovered by the party damaged by proper action in any court of competent jurisdiction."—Mills' Ann. Stats., sec. 3706; Laws 1887, p. 368, sec. 1.

In the second count, or for a second cause of action, the plaintiffs, after repeating the preliminary allegations as to the incorporation of the respective parties, and the description of the property destroyed, alleged as the cause of the loss that the defendant railroad company, its agents, servants and employees, negligently caused and set out a fire in and upon said defendant's right of way, and in and about its platforms and freight depot, and that said fire was by said defendant railroad company, its agents, servants and employees, omitting and failing to exercise due care and caution in the premises, negligently permitted and caused to escape from said right of way, platforms and freight depot, and to communicate with and ignite and destroy the property of the plaintiff lumber company; that the destruction of said property was the probable, direct and natural result of the negligence of said defendant, its agents, servants and employees, in negligently causing and setting out the fire, and in negligently causing and permitting it to escape.

The third count charges a liability upon the defendant railroad company for the results of the fire

caused in the operation of its line of railroad, and also charges that these various acts done in the said operation of its line, were negligently done by the said defendant. These acts of negligence complained of are set out in considerable detail, and embrace among other things, the alleged improper construction and maintenance of the freight depot and platforms, so that it constituted and became an unusual and dangerous receptacle for the accumulation of all manner of loose and readily combustible materials; that, by reason of such negligence, there had accumulated and were suffered to remain in and about such depot and platforms long prior to and at the time of such fire, great quantities of loose papers, straw, dried weeds, unbaled excelsior packing, and so forth, where it was constantly exposed to immediate, great and unusual danger from fire from the locomotives and engines of the defendant railroad company in the operation of its line of railroad; that such an accumulation of combustible material so negligently permitted, constituted an unusually dangerous and constant exposure of said freight depot and platforms, cars and other railroad property adjacent thereto, and the property of adjacent owners to destruction by fire; that, despite such dangerous conditions and accumulations, the defendant railroad company negligently failed to provide or maintain suitable appliances or provisions for the extinguishment of fires; that it negligently permitted its platforms about the depot to become and remain saturated with oils and other inflammable fluids. That it negligently placed and kept for an unreasonable time upon its tracks in said yard, in a dangerous and improper place, in close and dangerous proximity to its depot and platforms and such accumulations of combustible and inflammable materials, a carload of gunpowder; that said defendant negligently failed to extinguish the

fire, and after its commencement failing to remove the car of powder from its dangerously exposed position, as it was its duty to do, negligently permitted and caused the fire to communicate with the powder, whereby it was exploded, and large quantities of burning material, brands, sparks and fire were cast upon the property of the plaintiff lumber company, causing its destruction.

The fourth count or cause of action repeats the allegations in the third count as to the incorporation and character of the parties, description of the property destroyed, and also description of the alleged negligent and dangerous conditions existing in the yard at the time of the fire, and adds thereto a copy of an ordinance of the city of Colorado Springs under which it was claimed that the keeping of the car of powder in the yards at the time was in violation of law; and adds, also, an allegation to the effect that by reason of defendant railroad company's negligence in exposing said car of powder and explosive in its improper and dangerous condition and in consequence of the rapid spread of the fire in the direction of the car, consequent upon the burning of the large quantity of combustible and inflammable materials negligently permitted by said defendant to have accumulated and remained upon its right of way, the firemen of the city fire department of Colorado Springs having come upon the premises for the purpose of extinguishing the fire, were deterred and prevented by reason of the danger to their lives and limbs occasioned by the presence of said powder car in its dangerous exposure to the fire, in their endeavors to extinguish the fire, and were compelled, in order to secure their personal safety, to cease their efforts and withdraw from the premises.

The defendant railroad company interposed a demurrer to the entire complaint upon the ground

that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous, unintelligible and uncertain, and also upon the same grounds demurred separately to each of the several alleged causes of action, separately set forth in the four several counts. These being overruled, the defendant railroad company answered separately the several causes of action, denying each and every allegation therein except the allegations as to its incorporation and the ownership and operation by it of a line of railroad through the city of Colorado Springs at the date charged.

At the trial, before any evidence was introduced, defendant railroad company moved the court to compel plaintiffs to elect upon which count of the complaint they would proceed. This motion was sustained, and the plaintiffs reserving their exception, elected to stand upon the third count, which, however, by leave of the court, they were permitted to amend by interlineation, so as to allege more specifically that the fire was negligently set out by the defendant railroad company, and also that it was set out and caused in the operation of said company's road. The other counts were stricken out. Upon the conclusion of the testimony offered in behalf of the plaintiffs, defendant railroad company moved that the jury be instructed to return a verdict in its favor. This motion was sustained on the ground, as stated by the court, that the origin of the fire had not been satisfactorily proven.

1. In pleading at common law, a second count might embody a new cause of action, or be a statement in different form, of a single cause already declared on. Under the code practice different causes of action must still be separately stated, but it is generally required that the different statements or counts should contain causes of action different in

fact, the code requiring usually that a complaint shall contain a statement of the facts constituting the cause of action without repetition, or sometimes, as in the language of our code, without unnecessary repetition. This rule, however, is by no means ironclad, and is subject to many exceptions, sometimes depending upon the nature of the statutory provisions. It may be said generally, however, that the code practice discourages at least the insertion in a complaint of a second count which contains the same cause of action and statement of facts set forth in a different cause. A duplicate statement of the same cause of action and of the same facts in other words, is not usually good pleading.—Bliss on Code Pleading, § 119. If a complaint is supposed to be obnoxious to this rule, the proper proceeding on the part of the defendant is a motion requiring the plaintiff to elect upon which count or statement he will go to trial. It is impossible from the very nature of the case to lay down any fixed specific rule which should in all cases control the trial court in its determination whether such motion should be sustained or denied. It would seem, and it has been so held by this court, to be the better rule that the matter be left to the discretion of the trial court, regulated and controlled by the circumstances of the particular case in which the motion is made.—*Manders v. Craft*, 3 Colo. App. 238. The exercise of that discretion, however, would of course be subject to review by the appellate courts, and its abuse would be ground for reversal.

In *Follett et al. v. Railway Co. et al.*, 36 N. Y. Supp. 200, it was said in reference to a motion of this character: "The motion was properly denied. Under our present system, parties are allowed to plead the real facts. What benefit would result from that liberality, if, upon the trial, the party may not prove the facts as pleaded? A party has an absolute

right to plead and prove the facts upon which his rights depend—to prove them all, and to prove them as they took place. The determination of the rights that flow from those facts is the duty of the court, which cannot properly be transferred to the party. The only motive conceivable for urging such a motion is a hope that the party might make an unwise election, to the detriment of his rights. To compel a party to take a position involving such a peril would be an abuse of discretion which would speedily be corrected by the appellate court.”

In *Brockett v. Railway Co.*, 47 Atl. 764, the Connecticut supreme court of errors said the plaintiff was “entitled to allege what was substantially the same fact in different forms, to meet the possible conditions of testimony. Such double allegations are improper only when plainly unnecessary, or one or the other is false, to the knowledge of the pleader.” In that case it was said that the counsel for plaintiff was strangely mistaken in supposing that he could make two causes of action out of the injury to his client, and that the separation of his material allegations by the words “second count” was unwarranted and ineffective, but the trial court emphasized the fault by its error in ordering the plaintiff to elect on which count she would proceed. The practical effect of this, the court said, was to compel the plaintiff to omit an averment she was entitled to make.

In a very recent Missouri case, *Rinard v. Railway Co.*, 64 Southwestern 127, it was said, a plaintiff “may plead a single cause of action in as many different counts as he chooses, to meet any possible state of the proofs, and this will not make his counts repugnant. * * * If any one of the counts in a petition so framed is good, it will support a general verdict. This being true, a plaintiff cannot be compelled to elect upon which count he will stand. In

the case at bar, the cause of action is single. * * *
There was no error in overruling the motion to elect."

The Colorado code provisions which are applicable to the question before us are contained in code sections 49 and 70. The latter provides that a plaintiff may unite several causes of action in the same complaint, when they arise out of any one of certain specified classes, one being all actions sounding only in damages for injuries to property, but that in all such cases it should be necessary to state separately the different causes for which the action is brought.

Section 49 provides, among other things, that the complaint shall contain "a statement of the facts constituting the cause of action in ordinary and concise language, without unnecessary repetition."

In *Manders v. Craft*, *supra*, this court, in discussing and construing this last cited section, held that the words "without unnecessary repetition" must of themselves in many instances modify the rule as usually laid down in general terms, and said as a reason therefor that "the obvious intention of the system of code pleading is that it shall be more equitable than that of the common law, To so construe it as to render it more restrictive would defeat the intention. In *Bliss* it will be observed that the rule is considerably modified. The language is: 'But it is generally required,' showing that it is not regarded as arbitrary and mandatory, but that there are many exceptions, and this is supported by the context of section 119 and subsequent sections. * * * The statute prohibits unnecessary repetition, but does not prohibit repetition entirely." The court said there were many cases where a party should be required to elect, but added: "There are also many cases where the arbitrary application of the rule would prevent justice."

In *Cramer v. Oppenstein*, 16 Colo. 511, the su-

preme court said in construing this same section: "Duplicate statements for the same cause of action are not absolutely prohibited. They may sometimes be necessary and therefore permissible, as where there is reasonable cause to believe that the plaintiff cannot safely go to trial upon a single statement. There may be circumstances under which the plaintiff cannot reasonably be expected to anticipate the evidence in advance of the trial."

In *Leonard v. Roberts*, 20 Colo. 90, the court said: "The code does not absolutely prohibit such pleadings, but provides simply that the facts 'shall be stated in concise language without unnecessary repetition.' It is sometimes impossible for the plaintiff to be certain in advance of the real ground of liability, and while double pleadings should be restricted within the narrowest limits possible without unnecessarily endangering plaintiff's rights, or subjecting him to the danger of a nonsuit, in this case the trial court properly refused the defendant's motion to compel plaintiff to elect upon which count he would proceed." In that case the court expressly stated, it was admitted that the cause of action was the same in both counts, the double statement being used for the purpose of meeting the exigencies of the proofs. It must be borne in mind that whatever may be the force and extent of the prohibition of a double statement of a single cause of action as contained in section 49, the unnecessary repetition which is prohibited is of the facts only, constituting the cause of action.

In *Manders v. Craft*, *supra*, one of the authorities cited by the opinion in support of the doctrine announced by the court was *Birdseye v. Smith*, 32 Barb. 217. In that, it was said: "Several statements of the same cause of action, substantially the same, and differing only in form, are not necessary, but

where the statements differ materially and in substance, and are not unnecessarily inserted, and cannot mislead the defendant or embarrass the defense, but are only inserted from the caution which every good practitioner finds it necessary to exercise to guard against the infirmities of human memory and the defects of human testimony, I would allow them to stand as not unnecessary repetitions."

Bliss, section 120, says: "Affirmative provision is made for the union of different causes of action, and it is not required that they be such causes that a recovery may be had upon each; nor would the joinder be such a repetition of facts as is forbidden. The facts in the two statements would not be the same; there may be actually two grounds for the action, or, being only one, certain supposed grounds may be so connected that the plaintiff may not be able to tell in advance which will be established upon the trial. The code will have failed in its chief object if he is forbidden to develop every ground upon which he bases his right of recovery."

2. Applying these principles, thus authoritatively announced by both the appellate courts of Colorado, and also by the highest courts of other jurisdictions in well-considered opinions, and which commend themselves to us as eminently sound and reasonable, we think it manifest that in this instance the sustaining of the motion to compel plaintiffs to elect on which of the four counts they would proceed, was an unsound exercise of judicial discretion, and was prejudicial error. Whatever may be said as to the second, third and fourth counts, whether they together constituted but one cause of action, and were merely different statements of it, it is certain that the first count stated a cause of action which was distinct and different from that set forth in any one or all of the other three. This was a statement of the

statutory liability. Under it the question of negligence was entirely eliminated. Under it the plaintiffs were entitled to recover if it were shown that their damages were occasioned by a fire that was set out or caused by the operating of defendant railroad company's line of railroad, or of any part thereof. The remaining counts, whether they set forth one or more causes of action, sought to enforce the common-law remedy of plaintiffs, and were based wholly upon the negligence of the defendant railroad company. The causes of action, therefore, were entirely different. The one entitled plaintiffs to recover on the simple showing that the fire was set out or caused by the defendant railroad company in the operation of its road. To support a recovery under the other, this was by no means sufficient. This might have been proved beyond doubt, or even conceded, but still plaintiffs would have been required to go further, and to have shown the negligence of the defendant railroad company. That the plaintiffs had a right under code section 70 to unite these two causes of action in the same complaint, is, we think, clear under all code authorities, and beyond question. In *Railway Co. v. Henderson*, 10 Colo. 2, our supreme court in construing the stock killing statute, says: "The statute is in our judgment simply cumulative. The object of the legislature was not to interfere with the owner's existing rights, but owing to the difficulty of establishing negligence, to give him additional relief." This language is, we think, equally applicable to the fire statute. Nowhere in the statutes, either within the fire statute itself, or elsewhere, is the slightest intent manifested to substitute this for the common-law remedy of a party, and entirely abolish the latter, and to so hold would in our opinion be a judicial assumption without authority or support. If, therefore, the two remedies still exist, the causes

of action arising under them can unquestionably be united in the same complaint, because the action is for injuries to property, and in such case, by express provision of the code, the two causes are required to be stated separately in the complaint.

In *Colorado Coal and Iron Co. v. Carpita*, 6 Colo. App. 252, the doctrine which we have announced is recognized, and the court says also that where it is proper to join two causes of action, one under the statute and the other at common law, "they should be separately stated, and each should contain enough to show a cause of action on the theory which may be adopted." We believe it therefore to be indisputable that the complaint in question contained at least two distinct causes of action, the one statutory and the other at common law, which might properly be united, and which it was not only the privilege but the duty of the plaintiffs, under the express requirements of the code, to state separately.

3. As there must be a retrial of this cause, it is not improper, and indeed, fairness to the trial court and to counsel would seem to require, that we should consider, briefly at least, the second, third and fourth counts in the complaint, with reference to the interposition of a motion requiring plaintiffs to elect between them. Whether they may be considered as each setting forth a distinct cause of action, or as a statement of only one cause of action, but in different form, we do not think they come within the prohibition of the code or of the rules of practice laid down by our appellate courts. Considered as stating but one cause of action, the statements are not inconsistent or contradictory, are not duplicate statements, are not repetitions of the same facts, whether necessary or unnecessary. Each contains the statement of some material fact or facts not contained in either of the others. The second count is predicated solely

upon the negligence of the defendant railroad company, its agents, servants and employees, in causing and setting out a fire upon its right of way, and in and about its platforms and freight depot, and in negligently causing and permitting it to escape from its right of way, whereby the property of the plaintiff lumber company was destroyed. This would seem to set out a cause of action complete and perfect in itself, as well as distinct from the others. The alleged liability of the defendant railroad company was not based upon the fact that the fire was caused or set out by it solely in the operation of its line of road. The third count charges a liability against the defendant for the results of fire caused in the operation of its line of road, and also charges that the various specified acts done in the operating of its line of railroad were negligently done by the defendant. These various acts are set out in great detail, and are summarized in a preceding part of this opinion. They concern more particularly the alleged negligent and dangerous condition of the right of way at and about the place where the fire originated, and by reason and by means of which the fire was charged to have been communicated to and destroyed the property of the plaintiff lumber company. They embrace also the alleged negligent construction of the freight depot and its platforms. In this count it is also charged that defendant well knowing the dangerous condition of its right of way, negligently failed to use proper care and precautions against fire and to maintain any suitable appliances for the extinguishment of fire. The fourth count charges, among other things, that the placing of the car of powder where it was at the time of the fire was in violation of an ordinance of the city of Colorado Springs, and further, that the defendant railroad company negligently failed to remove said car of

powder from its exposed position when the fire originated, as it was its duty to do; also that by reason of the improper placing in such an exposed condition of the car of powder and the failure to remove it, the fire department of the city which had come upon the premises with their appliances for the purpose of extinguishing the fire, were deterred and prevented in their efforts so to do, and as they might otherwise have done, by reason of the great peril and imminent danger to life and limb to which the firemen were exposed. Each of these statements contained some material facts alleged to constitute negligence, which were not included in either of the others. They were not duplicate statements, therefore, in any sense, nor merely repetitions in a different form of the same facts constituting the cause of action previously declared on, hence they were not obnoxious to the rule which prohibits additional counts, where they contain simply a statement of the same facts as the others. Nor was there anything in them which could by any possibility have misled or embarrassed the defendant railroad company.

The several counts being of such a character, the compulsory election by plaintiffs of only one upon which to rely would necessarily cause them to lose the benefit of some allegations as to material facts bearing upon the question of the negligence of defendant railroad company, and its subsequent liability. The liberal provisions of the code and policy of the code practice do not require a plaintiff to be placed at such a disadvantage, and especially should not, when it is manifest, as it is here, that by permitting all the counts to stand the defendant could by no means be prejudiced. We think this clearly a case where the plaintiffs' supposed grounds of action are so connected, and where there are allegations of so many different facts constituting negligence, that it

may well be said the plaintiffs were unable to anticipate what would be established by the testimony upon the trial, and hence should have been permitted to have gone to trial upon all of the four counts as set forth in their complaint. It was not obnoxious to the provisions of the code, nor to the rules of pleading as laid down by our appellate courts.

4. This error of the court in requiring plaintiffs to elect was emphasized by subsequent rulings, some clearly erroneous, and all, whether erroneous or not, manifestly prejudicial to the plaintiffs, because of the vacillating position of the court. First, the demurrer attacking separately each count in the complaint because it did not state facts sufficient to constitute a cause of action having been overruled, the court sustained the motion requiring plaintiffs to elect upon which one of these four counts, each of which had been so held to be good, they would stand, and denied their request that they be allowed to stand upon the common law and statutory causes of action. Leave was then granted to plaintiffs to amend the third count, upon which they elected to stand, by interlineation, and this they did by alleging more specifically that the fire was set out and caused in the operating of defendant railroad company's road, so as to have embraced in this third count, as contended by plaintiffs, the statutory right of action, and have sustained a recovery upon that ground, if a recovery was had. Whether this contention of plaintiffs was well founded or not, they were deprived of all benefit from the amendment so allowed by a subsequent ruling of the court during the progress of and early in the trial, to the effect that the plaintiffs would not be permitted to recover by virtue of the statute in any event, but would be restricted in their recovery, if any such might be had, to the common-law remedy, based wholly upon

the negligence of the defendant railroad company, and ruling that such negligence must be shown to have consisted in the defective construction or in the careless handling of said defendant's locomotives. Again, at first and during several days of the trial, plaintiffs were not permitted, although they offered testimony to that effect, to introduce any evidence except that relating to the actual starting of the fire. The alleged dangerous and highly inflammable condition existing on the right of way at the time of the fire might have had a material bearing in determining this question. Subsequently, the court ruled otherwise, and permitted the introduction of such evidence, but we can by no means say that this cured the error, or removed the prejudicial effects upon plaintiffs, which its previous ruling tended to cause. Under the counts setting up the cause of action at common law, in any event plaintiffs might have been entitled to recover even though the fire had not been negligently set out by the defendant railroad company in the actual operation of its line of railroad. It is true that trial courts have large discretionary power as to the order of introduction of testimony, but it must be exercised so as not prejudicially to affect the rights of a party. In this instance we think this action of the court might have unfairly influenced the jury, and certainly would have so tended in connection with the previous erroneous ruling of the court, to the effect that the only negligence which would have entitled plaintiffs to recover must have consisted in the defective construction or in the careless handling of defendant railroad company's locomotives.

5. It having been alleged in the complaint as a ground of action that the defendant negligently permitted the fire to escape from its right of way, and thereby plaintiff lumber company's property

was destroyed, evidence would be admissible to support the allegations of the complaint charging the negligence of the defendant railroad company in permitting large masses of combustible and highly inflammable material to accumulate and remain upon its right of way, and also in support of the allegations as to the negligent placing of the car of powder in an improper and exposed position, and maintaining it there for an unreasonable and unnecessary length of time. Whether such evidence would be admissible and available for any other purpose and to what extent, and whether by reason of such matters, if shown, the defendant railroad company would be liable, even though the evidence failed to establish that the fire was originally set out or caused by said defendant—questions which are elaborately and ably discussed by counsel for both sides in their briefs—we are not required to determine as the case is presented on this appeal. The complaint was framed upon the theory that the fire was set out or caused originally by the defendant railroad company, its employees or agents, and all of the testimony offered or received upon this branch of the case was in support of that theory and allegation. Upon the new trial, the evidence may be widely different, and it would not be proper for this court to express in advance its opinion upon questions of fact not presented, and which may not be hereafter.

6. Counsel also discuss at some length the question as to the meaning of the words, "set out or caused by operating its line, or any part thereof," which are in the fire statute, with reference to a determination of what acts, duties and obligations of a railroad company are embraced in or included by such words. As the case is presented, it is not necessary for us to pass upon this question. If the action were based wholly upon the statute, or if at the trial

the count based upon the statute had been permitted to remain in the complaint, this might have been very material, because under the statute the defendant railroad company could not have been held liable unless the fire had been set out or caused by operating its line, or some part thereof. Even in actions under the statute, however, there might be cases in which it would not be necessary to construe this language, as for instance where it was shown that a fire had been set out by fire or sparks from a locomotive of the railroad company actually engaged in moving a train along its line of road. In such case there could be no room for dispute that the fire was set out or caused by the operation of the road. This question, however, of statutory liability was entirely eliminated from the case by the ruling of the court. Under such circumstances it would be manifestly improper, even if possible, desirable and important though it might be in the trial of other cases, for this court to give a blanket construction of such language in advance of the presentation by evidence of the facts to which it must apply. When the facts are developed by the evidence, it might be found that the definition or construction given by the court would be wholly inapplicable to them—that they would be such as were not embraced in or included by it at all.

7. The court excluded the evidence of a witness tendered by plaintiffs to show the results of an examination made by him within a short time—a week or two after the fire—of the switch engine belonging to defendant railroad company, which was claimed to have passed on the track close to the place where the fire originated and was first discovered, and but a few minutes before its discovery, and fire from which was claimed to have caused the fire. In this we think the court erred. The time of the examination was not too remote, although of course the force

and weight of the evidence would have been dependent upon the nature of the imperfections and defects in construction, if any, and upon the ability of the plaintiffs to show by other facts possibly, reasonable grounds for the conclusion that such defects existed at the time of the fire. If the evidence had failed to show any defects in construction at the time of the examination, the defendant railroad company would not have been prejudiced. Presumably it was offered for the purpose of attempting to show defective construction or conditions existing at the time of the fire.

Plaintiffs offered testimony of several witnesses tending to show the setting out of fires at other times and places by other locomotives of the defendant railroad company, but it was excluded by the court. In this we think the court did not err. The case relied upon by appellants in support of their contention that the evidence was admissible does not in our opinion sustain it.—*Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454.

In that case, no particular locomotive was identified as the one that set out the fire. It might have been one out of many. The evidence, too, upon which the court in that case was commenting and which it held to be admissible, was offered in rebuttal by plaintiff, to contradict evidence introduced by the defendant railroad to show that it exercised care in the construction and operation of its engines generally. In this case the engine was identified. There was only one, if any, which could have caused the fire. In such case, the only pertinent inquiry was as to the construction and management of that particular engine. It might have had other engines which were faulty in construction, or its employees might have negligently handled other engines, but we do not see how in reason these facts would have been

any evidence that the particular engine in question, charged to have caused the fire, was faulty in its construction, or that it was negligently handled.—*Gibbons v. Railroad Co.*, 58 Wis. 339.

We of course do not mean to hold that such evidence would not be admissible in any case. There might be cases where it would be proper and competent, but under the facts presented in this case, for the reasons we have suggested, this is not one of them.

8. It is urged that even though in a suit for recovery of damages by the owner of property destroyed by fire set out or caused in the operation of a railroad, the common-law and statutory causes of action might be joined, yet it cannot be done in this suit, because the insurance companies are joined with the owner as parties plaintiff, and that hence the court did not err in striking out the first count of the complaint. In other words, it is claimed that the insurance companies cannot be subrogated to the owner's rights in an action where recovery is claimed solely by virtue of the statute. We do not understand counsel to challenge this right of subrogation where the loss was occasioned by the negligence or wrongdoing of another, and the common-law remedy is sought to be enforced. In such case, we believe the right to be very generally, if not universally, recognized.—2 May on Insurance, § 454; 2 Biddle on Insurance, § 1280, *et seq.*; Harris, Law of Subrogation, § 606; Sheldon, Subrogation, §§ 11, 230.

It has also been held in many adjudicated cases that this right of subrogation exists whether the fire is caused by negligence, or accidentally, within statutes imposing a liability in any event, which directly covers the case at bar.—See 2 Biddle, § 1281, and cases cited; *Hart et al. v. R. R. Corporation*, 13 Metc. (Mass.) 100.

In the case last cited, which was an action under a fire statute precisely similar to ours, the rule and the reason for it is thus forcibly expressed (p. 105):

"Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. * * * It follows as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists the party holding the legal right is conscientiously bound to make an assignment, in equity to the person entitled to the benefit, and if he fails to do so, the *cestui que trust* may sue in the name of the trustee and his equitable interest will be protected."

We have been referred to no cases holding the contrary. Of course, to enforce liability under the statute it may be well claimed and is required that the owner should be a party to the suit, because it is to him that the statute specifically gives the right of recovery and of indemnity. It is his right only which can be enforced, and it must be done in his name. In all cases the right of subrogation is based upon the doctrine that the contract of insurance is treated as an indemnity, and the insurer as a surety is entitled to all the remedies and securities of the assured, and to stand in his place, or upon doctrines of a simi-

lar equitable character.—2 May on Insurance, § 454; Harris, Law of Subrogation, § 13, *et seq.*

This being true, we see no reason why the right of subrogation should be denied in the one instance any more than the other, unless because of some prohibitory statute, or unless perhaps in the absence of any contract for subrogation the facts might be such as to negative the existence of any equities in behalf of the insurer. None of such possible exceptions, however, apply to this case. The authority upon which counsel for appellee depend for support of their position—a Colorado case—does not in our opinion sustain them.—*Home Ins. Co. v. Railroad Co.*, 19 Colo. 48.

In that case the remarks of the court upon which counsel rely were addressed to the contention by counsel for the insurance company that its cause of action was supported by strong equities. The court said that if such were the case, the facts showing such equities should have been pleaded, thus giving defendant an opportunity to controvert them, or to confess them, because where the liability existed by the mere force of the statute, the equity of the insurance company was not necessarily very strong, and in some instances it might be very slight, or even have no existence at all. Nowhere in that case as we read it, was it denied that an equitable right of subrogation might exist, much less was it denied or questioned even by the slightest implication that the right of recovery by the insurance company might exist by virtue of an express contract between the owner and the insurer, by assignment to the latter from the former. In the case at bar, each policy issued by the plaintiff insurance companies contained the following clause: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or mu-

nicipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment." This was one of the express conditions upon which the policy was issued. It entered into and was a part of the contract of insurance at the time when it was made. It entered into the consideration when the insurance company took the risk, and in this respect takes the case entirely without the reasoning of the court in *Home Ins. Co. v. Railroad Co.*, *supra*, as to why the equities of the insurance company might not be very strong in an action under the statute. It is not sought in this action to mulct the defendant railroad company in a double payment for damages. It seems to us immaterial to whom the defendant railroad company should pay the loss, if liable at all, whether to the owner or to the insurance company, provided that it be not required to pay it twice. It would be unreasonable to permit the owner to recover double payment of the damages occasioned by his loss, once from the insurance company, it being compelled to pay because of its contract of insurance, and once from the railroad company, it being liable by virtue of the statute. It would be equally unreasonable to permit the railroad company to have the benefit of the insurance. It should not lie in its mouth to say to the insurance company which has paid the loss, You took into consideration the great risk when you made the contract of insurance, and the statute gives to the owner only the right of recovery, and I, although the cause of the loss, will reap the insurance benefits. Nor should it be permitted to say to the owner, in a suit prosecuted in his name but for the benefit of the insurers, You have been indemnified for all loss once by payment

from the insurance company, and you should not be allowed to recover from us for the same loss, thereby securing double payment. We think it clear under the facts of this case, whatever the existing conditions might be in other cases which in equity would deny the right of subrogation to the insurance company, the position of counsel for appellee is untenable.

9. In directing a verdict for the defendant railroad company, the court gave as its reason that the railroad origin of the fire had not been satisfactorily proven,—that it had not been proven so as to exclude a probability of its having occurred in some other way. Upon this question we deem it neither necessary nor proper to pass. The errors of the court in the incipency of and during the trial were so serious and so prejudicial to plaintiffs, both as to the character of the evidence which they were permitted to introduce and as to the manner of its introduction, that the conclusion is irresistible that they did not have a fair trial; and because in the new trial which must be had the evidence may be materially different. For instance, conceding that the evidence admitted was insufficient to prove the fact, this might have been otherwise if the court had not excluded testimony offered with regard to the examination into the condition of the switch-engine which was supposed to have originated the fire,—or might at least have been sufficient to have required the submission of the question to the jury. It is not improper, however, and in view of the subsequent trial to be had, it is probably just to both litigants, that we should briefly at least allude to the widely divergent and extreme positions taken by the respective parties as to the amount and character of evidence necessary to establish the railroad origin of fire in cases of this character. Appellants seem to assume that very slight testimony alone is sufficient to make at least a

prima facie case. To sustain them they rely upon *Railway Co. v. De Busk*, 12 Colo. 296. Appellees and the trial court assumed a position which went to the other extreme, and rely for their support upon *Stratton v. Railroad Co.*, 7 Colo. App. 126. In both cases the parties have been led astray by disconnected expressions and sentences used in the opinions rather in the line of argument, but not amounting to a positive decision. As very pertinent in this connection, we give a citation from the brief of appellees: "As was said in *Johnson v. Bailey*, 17 Colo. 69, 'It is not every remark in a judicial opinion that amounts to a judicial decision.' In *Cohens v. Virginia*, 6 Wheat. 97, Chief Justice Marshall said, 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, and their possible bearing on all other cases is seldom completely investigated.'"—*Wadsworth v. Railway Co.*, 18 Colo. 600.

This citation applies with peculiar force to a question of this kind, where from the very nature of the case it is impossible to formulate a rule which will be applicable in all cases, and under all circumstances. In the *De Busk* case, the opinion was directed chiefly to a discussion of the constitutionality of the fire statute. It is true the court said that the evidence in that case was sufficient to warrant the inference that the fire was caused by a pass-

ing train of the defendant, but it did not detail the evidence nor the attendant circumstances and conditions from which the court or the jury was entitled to draw the inference that there was no other apparent cause for the fire. It is in another part of the opinion, and in the argument of another question, that the writer stated, "The origin of a fire has generally been held sufficiently established by inferences drawn from slight circumstantial evidence," but the opinion did not declare that to be the rule in this jurisdiction. It simply stated in the course of the argument that it had been so generally held. In the Stratton case it was sought to fasten the origin of the fire upon the railroad company, because there had been a fire at or about this place five days previous, which was claimed to have been caused by an engine. The contention of the plaintiff was based upon the bare supposition that this fire had been communicated to the bottom of a stack of hay and to a pile of manure, and had smouldered there during the five days, and had caused the second fire. As said by the court, the whole evidence appeared to have been entirely suppositious, there being none whatever of a positive or direct character. It was to this state of facts that the court addressed its remarks, upon which the appellees in this case place such strong reliance. As we have said, it is impossible to lay down any rule which will apply to all cases. Naturally, it must in a large majority of instances be circumstantial, but none the less it must be of sufficient strength and force, considering the surrounding circumstances and conditions, to justify a reasonable and well-grounded inference by reasonable men that the fire was of railroad origin. We do not consider, however, that it must be of such weight and force as to exclude every possibility of the fire having originated from some other cause. It may be said that it

must exclude every other probability, but this must be every other reasonable probability, and must be such as would arise from the evidence as to the facts and attendant circumstances and conditions. The plaintiffs should not be allowed to establish a fact which imposes a liability, nor the defendant escape a liability, by mere conjecture, not legitimately based upon facts, circumstances, and natural conditions shown by the evidence. The fact of the origin of the fire should be established like any other material fact in the case. The jury within certain limits may be permitted to infer the fact upon circumstances proved, but such proof should be amply sufficient to rebut the probability, considering the facts, circumstances and conditions of the particular case, disclosed by the evidence, of the fire having originated in any other manner. Especially would it seem to be proper that this should be the rule in actions under the statute, where the railroad company is held responsible regardless of any questions as to its want of care, or its negligence.

10. In the determination of this case we might have contented ourselves with a judgment of reversal based upon the first error which we have considered, and not have discussed at all a number of questions upon which we have passed. In view of the fact, however, that there must be a new trial of this cause, and because, as stated by both counsel, there are a number of other suits pending growing out of the same fire, we thought justice to litigants required that we should pass upon these questions, they being properly presented in the case before us. We have most carefully endeavored, however, to avoid saying anything which might be prejudicial to either party in the determination of the questions which may arise in the retrial, which are not now before us on a complete statement of facts.

For the reasons given the judgment will be reversed and the cause remanded for a new trial in accordance with the views here expressed.

Reversed.

[No. 2063.]

RACHOFSKY ET AL. V. BENSON.

Appellate Practice—Costs.

There were three separate suits in replevin in the lower court, a separate judgment in each case, and a separate appeal therefrom and appeal bond and transcript in each case. Held, that the three cases could not be docketed as one case in the appellate court, but must be separately docketed, and a docket fee paid in each case.

Appeal from the District Court of La Plata County.

Mr. N. C. MILLER, for appellants.

Mr. F. C. PERKINS, Mr. B. W. RITTER and Mr. ORLAND S. ISBELL, for appellee.

Per Curiam.—The appellants brought three actions in replevin against M. C. Benson, alleging in each case the ownership and possession, in themselves, of the property described in the complaint in that case, its wrongful seizure and wrongful detention by the defendant, and a refusal by defendant to deliver it to them, upon demand made by them. In each case judgment was rendered against the plaintiffs; in each case the plaintiffs prayed an appeal to this court; in each case the prayer was allowed, and the penalty of the appeal bond, and the time within which it should be filed, fixed; a separate appeal bond was filed in each case, and a separate transcript, separately certified, of the record in each case, was brought to this court. Before any of the cases were tried the defendant died, and his widow, who was administratrix of his estate, was substituted as defendant.

The appellants have bound the three transcripts together, and lodged them in this court as one transcript; and have caused the three appeals to be docketed here as one appeal. There is no warrant for such a proceeding. The law contemplates a review on appeal or writ of error of the final judgment in a single suit, and not a complication of judgments rendered in a number of cases.

Rule 30 of this court requires the payment to the clerk, upon filing of each suit or proceeding, of twenty-five dollars by the party bringing the proceeding, which shall be in full payment of all clerical costs of such party in the cause, except for copies of papers. Here were three proceedings brought as one, for each of which twenty-five dollars should have been paid, but for two of which nothing was paid.

The appellants will, within thirty days, cause each of the three cases to be docketed separately in this court, paying to the clerk, in two of them, the fees prescribed by the rule, or the appeals in the two cases not docketed will be dismissed.

Dismissed.

April Term, 1902.

[No. 2049.]

SANER ET AL. V. THE PEOPLE.

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1. Cities and Towns—Action for Violation of Ordinance—Complaint.

In an action before a police magistrate against a defendant for violating a town ordinance, the only process required is a summons. A complaint is unnecessary, and where a defendant appeared and went to trial upon a complaint, and the evidence did not depart from the cause laid in the complaint, and the presence of the complaint worked no prejudice to defendant, he cannot object to the insufficiency of the complaint.

2. Same—Appeal.

An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the complaint so far as they affected the procedure before the magistrate.

3. Cities and Towns—Action for Violation of Ordinance—Complaint.

In an action before a police magistrate against defendant for violating a town ordinance, a complaint which notifies defendant of what ordinance he is charged with violating and the manner in which it is claimed the ordinance was violated is sufficiently certain in stating the cause of action.

4. Cities and Towns—Action for Violation of Ordinance—Appeal—Summons.

An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the summons.

5. Cities and Towns—Violation of Ordinance—Judgment.

A judgment of a police magistrate convicting defendant of a violation of a town ordinance, which directs that in default of the payment of the fine adjudged against defendant, that he be confined in the town jail, or if there be no such jail, in the county jail, is warranted by section 4435, Mills' Ann. Stats.

(307)

6. Appellate Practice—Bill of Exceptions—Amendment—Objection Waived.

An objection to an amendment of the bill of exceptions on the ground of insufficiency of notice of application for an order to amend by the lower court, comes too late, where issue is joined after the amendment is filed and the first objection to the amendment is urged in appellant's reply brief.

Appeal from the County Court of Arapahoe County.

Mr. JOHN W. HELBIG, for appellants.

Mr. FRED G. BABCOCK, for appellee.

GUNTER, J.

A complaint was filed with a police magistrate in form as follows:

"In police magistrate court, state of Colorado, county of Arapahoe, town of Berkeley, ss.

"The People of the State of Colorado v. George Saner and Orrin W. Wilcox.

"Byron E. Morris, being duly sworn, on his oath says that section 2, of ordinance No. 14, 1896, of the town of Berkeley, being an ordinance entitled 'An ordinance concerning the sale of intoxicating liquors, passed and approved on the 7th day of July, A. D. 1896,' has been violated, and that this affiant has good reason to believe that George Saner and Orrin W. Wilcox are guilty thereof, in this: That the said George Saner and Orrin W. Wilcox, on or about the 30th day of September, A. D. 1898, at the town of Berkeley, in the county of Arapahoe, and state of Colorado, did unlawfully have and keep within the limits of said town of Berkeley a house and place for the selling of intoxicating liquors without having first obtained a license therefor from said town, against the peace and dignity of the people of the state of Colorado. Byron E. Morris." Verified.

Summons issued and served. Defendants below, appellants here, appeared; a trial upon the mer-

its was had, and judgment went against defendants. An appeal was taken to the county court, the case retried on the merits, defendants appearing, and judgment again entered against defendants. from which is this appeal.

Appellants contend:

1. That above complaint is defective.

This is a civil action for the recovery of an alleged indebtedness from defendants.—*City of Greeley v. Haman*, 12 Colo. 94, 20 Pac. 1.

As a warrant did not issue for the arrest of defendants the above complaint was unnecessary. The only process required to institute and bring this action to trial was a summons. This without any form of pleading.—*Mills' Ann. Stats.*, sec. 4435; *Miller v. Colo. Springs*, 3 Colo. App. 309, 33 Pac. 74.

The practice obtaining in the trial of this action was the same as that of justices of the peace in like actions.—*Mills' Ann. Stats.*, sec. 4438.

As the evidence did not in any manner depart the cause of action laid in the complaint, as the presence of the complaint in no respect worked any prejudice to appellants they are not in position to urge any insufficiency in it. It was simply superfluous, in no degree affecting the merits of the case. It is the policy of the present practice to disregard any error or defect in procedure not affecting substantial rights.—*Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730.

Further, the trial in the county court was controlled by the same procedure as obtains in the trial of any other ordinary civil action in such court.—*Walton v. Canon City*, 13 Colo. App. 77, 56 Pac. 671.

“Upon the trial of all appeals before the county court no exception shall be taken to the form of service of the summons issued by the justice of peace, nor to any of the proceedings before him, but the

court shall hear and determine the cause in a summary way according to the justice of the case without pleading in writing."—2 Mills' Ann. Stats., sec. 2687; Gen. Stats. 1883, p. 633, sec. 1987.

This section cured any defects in the complaint, if they existed, so far as they affected the procedure in the justice court.—*Deitz v. City of Central*, 1 Colo. 323.

Further, as this proceeding was instituted before a police magistrate, and was civil in its nature, exactitude was not required in stating the cause of action. Speaking of a complaint in a similar proceeding in *City of Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820, the court says, "Under ordinary rules of pleading, the complaint might have been quashed for insufficiency as not stating a cause of action * * *. But section 114 * * * provides as follows: 'In all suits brought for the recovery of any fines or penalties for violation of any ordinance, it shall be sufficient to state in the complaint or affidavit the number of the section and title of the ordinance violated, together with the date of its passage, without stating said section or ordinance in full or the substance thereof.' It must be remembered that this is a civil proceeding originally instituted in a court not of record. Hence, the statute is not obnoxious to the constitutional requirement that the accused in criminal prosecutions shall have the right to demand the nature and cause of the accusation."

The complaint advises the defendants of what they were called upon to answer, they knew thereby that it was for violating said section 2 of said ordinance, and the manner in which it was claimed that such section was violated was charged.

In speaking of a statement required to be filed for a violation of a city ordinance the court says in *City of St. Louis v. Smith*, 10 Mo. 440, "All, there-

fore, which is required is that degree of certainty necessary to inform the defendant of what he is called upon to answer, and not that particularity which is technically necessary to constitute a good indictment."

The complaint herein is sufficient. If defective it contains no reversible error.

2. That the summons issued by the magistrate is so defective as to be fatal to the subsequent proceedings.

Any defects in the summons were cured by the appeal to the county court.—Mills' Ann. Stats., sec. 2687; *Deitz v. City of Central*, *supra*; *Paul v. Rooks*, 16 Colo. App. 44, 63 Pac. 711.

3. That the evidence is insufficient to sustain the judgment.

The evidence is sufficient in the absence of any explanation by defendants.

4. "That the judgment is void in directing that the defendants, in default of payment of the fine adjudged against them, be confined in the town jail, or if there be no such jail, in the county jail."

The judgment is warranted by 2 Mills' Ann. Stats., sec. 4435; Gen. Stats. 1883, sec. 3317.

5. That the amendment to the bill of exceptions should not be considered because of insufficiency in the proof of service of notice of application for an order to amend by the lower court.

This objection comes too late. Since the amendment has been filed in this court issues have been joined by the brief of appellee and the reply brief of appellant without objection to the presence of this amendment until urged in the reply brief by appellant.

No reason appears for reversing the judgment below.

Judgment will be affirmed.

Affirmed.

[No. 2083.]

KING ET AL. V. MECKLENBURG.

1. Bills and Notes—Pleading—Partnership.

In an action against a partnership firm upon a promissory note signed by the firm, an answer that a member of the firm executed the note for a purpose outside the partnership business, and without the authority of his copartners, and that such facts were known to payee and to plaintiff before the note was endorsed to him, stated a good defense and it was error to sustain a demurrer thereto.

2. Bills and Notes—Endorsement—Presumption.

In an action upon a promissory note by an endorsee, the law presumes that the endorsement was made before maturity, and that the endorsee acquired the note in good faith for a valuable consideration in the usual course of business and without notice of any circumstance impeaching its validity, and an answer that the note was procured by fraud of the payee states no defense in the absence of averments overcoming these presumptions.

3. Bills and Notes—Endorsements—Defenses.

A second endorsee of a promissory note takes as good title as his endorser had, and in an action by a second endorsee an answer that would not be a defense to the note in the hands of the first endorsee is no defense as against plaintiff.

4. Pleading—Amendment—Discretion—Appellate Practice.

Where a pleading is demurred to, the pleader has a right to amend as of course, but when this right has been exercised by one amendment, any further amendment is within the discretion of the trial court, and unless it clearly appears that such discretion has been abused, a ruling of the trial court denying such amendment will not be disturbed by a court of review.

Appeal from the District Court of Park County.

MR. WEBSTER BALLINGER and MR. M. J. BARTLEY,
for appellants.

MR. CHARLES A. WILKIN, for appellee.

GUNTER, J.

The complaint is on this note, “ * * * On or about February 23, 1892, we promise to pay to C. L. Ferguson or order, one hundred dollars (\$100.00).

King & Wallace," and alleges its execution by defendant firm; its endorsement by payee to B. M. Mecklenburg, and by him to plaintiff.

1. The first ground of defense alleges that when the note was made, payee therein was indebted to defendant in the amount of \$118.05; that this sum was secured by guarantee of a coal company; that payee represented that said company was indebted to him in the sum of \$100.00 above said \$118.05; that in order to aid B. M. Mecklenburg in collecting an account due him from said payee the note was executed on payee giving an order to defendant on said coal company for \$100.00; that said note was given by H. S. Wallace, a member of defendant firm, without the knowledge or consent of either of the other members thereof; that the giving of the note was without the scope of the partnership business of defendant, and that its giving was in no way connected with its business, that at no time since the execution of the note has either of the other members of the firm assented thereto or agreed to pay it. Further, that B. M. Mecklenburg and the plaintiff had knowledge at all times of all the foregoing facts. According to these averments a member of defendant firm executed the note in question without the express or implied authority of his copartners for a purpose outside of the partnership business, and such facts were known to payee, B. M. Mecklenburg, and plaintiff prior to the endorsement to them of such note. Further, the making of the note has at no time been ratified.

The gist of these allegations is that defendant firm never made the note sued on.—*Hoosac Mining & Milling Co. v. Donat*, 10 Colo. 529, 16 Pac. 157. If so, then it is not liable thereon, and the answer states a defense thereto. The general demurrer of plaintiff

to this defense the court below sustained. In this it erred.

2. The substance of the allegations of the second ground of defense is that the execution of the note sued on was procured by the payee therein through fraud. As stated above, the note involved was endorsed by the payee therein to B. M. Mecklenburg, by him to the plaintiff. The law presumes this endorsement made before maturity of the note.—Daniel on Negotiable Instruments, vol. 1, 4th ed., § 784.

The law also presumes that such endorsee acquired the note in good faith for full value in the usual course of business and without notice of any circumstance impeaching its validity.—Daniel on Negotiable Instruments, vol. 1, 4th ed., § 812.

The alleged fraud of the payee in procuring the note would not constitute a defense to a suit thereon by B. M. Mecklenburg in absence of averments in the answer overcoming these presumptions.—Daniel on Negotiable Instruments, vol. 1, 4th ed., § 769a; Bliss on Code Pleading, 3d ed., § 175, p. 289.

Such averments are absent from this second ground of defense. So far as we are advised by this ground of defense, B. M. Mecklenburg took this note before maturity in the ordinary course of business for a valuable consideration without notice of any facts which invalidated it in the hands of the payee. As under the averments of this defense, fraud was not a defense to the note in the hands of B. M. Mecklenburg, it was not a defense in the hands of his endorsee, the plaintiff who took as good title to the note as had his endorser Mecklenburg.—Daniels on Negotiable instruments, vol. 1, 4th ed., § 782.

Further, as plaintiff, appellee here, was, according to the averments of the complaint, the endorsee and owner of the note the same presumptions attended his ownership as attached to the note in the

hands of the endorser, B. M. Mecklenburg. As these presumptions were not overcome by any averments in the answer, plaintiff's title to the note is good as against the defense of fraud, even though such title is unaided by the unimpeachable one of his endorser, B. M. Mecklenburg.—Authorities above cited.

The court correctly sustained the general demurrer to this cause of defense.

3. On sustaining the demurrer to the second defense, "defendant asked leave to plead further." This was denied. We have before us that defendant had twice amended its answer, and the ruling of the court denying leave to plead further. Upon this we are asked to declare that the court erred in denying leave to defendant to plead further.

Mills' Ann. Code, sec. 73, provides that after demurrer and before the trial of the issue of law therein the pleading demurred to may be amended once, as of course. This right the defendant had exercised when the leave to further amend was denied. The right to amend further was discretionary with the court.—Mills' Ann. Code, sec. 75.

"Unless it clearly appears that such discretion is abused, a court of review will not interfere."—*Anthony v. Slayden et al.*, 27 Colo. 144, 60 Pac. 826.

The presumption is that the ruling of the trial court was correct. Nothing is in the record to overcome this presumption as to the ruling complained of. We cannot, therefore, say that the trial court erred in denying the application of defendant for leave to plead further.

Judgment reversed for error in sustaining demurrer to first cause of defense.

Reversed.

[No. 2051.]

17 316
p19 11THE DELTA COUNTY LAND AND CATTLE COMPANY v.
TALCOTT.

1. Conveyances—Record—Notice—Title.

A purchaser of real estate is bound to know what the records disclose concerning the title, and if they indicate the existence of some outside condition by which it may be affected, he is bound to investigate and is charged with knowledge of the facts to which an investigation would lead. But if the records upon their face are complete, and show that the title is good, in the absence of information to the contrary from any other source, he may safely rely upon them.

2. Deeds of Trust—Release Deeds—Record—Innocent Purchaser.

A release deed by the trustee in a deed of trust is such deed or conveyance as comes within the meaning of our recording act, and where, after the maturity of the notes secured by a deed of trust, the trustee executed to the owner of the equity of redemption a release deed which was placed on record and which recited that it was executed at the request of the payee of the notes and in consideration of their payment in full, when, in fact, the notes had not been paid, and the release was executed without the authority or knowledge of the holder of said notes, as between the holder of the notes and the owner of the equity of redemption, the release was fraudulent and void, but one who purchased from the owner for value without notice of the fact that the notes had not been paid, acquired a title free from the lien of the deed of trust.

Appeal from the District Court of Delta County.

Mr. D. V. BURNS, for appellant.

Messrs. WOLCOTT & VAILE and Mr. WM. W. FIELD, for appellee.

THOMSON, J.

On the 19th day of October, 1889, The Grand Mesa Land and Cattle Company of Colorado executed a trust deed, whereby it conveyed to E. L. Kellogg, as trustee, certain real estate to secure the payment of its two promissory notes, made on the same day, for \$5,382.05 and \$3,487.55, respectively, and

payable to the order of Sam G. Gill three months after date. The trustee was empowered, in case of default in the payment of the notes, to sell the land at public auction to the highest bidder, having first given twenty days' notice of the sale, and to execute a conveyance of the premises to the purchaser, applying the purchase money upon the notes after deducting the expenses of the sale, and rendering the excess, if any, to the land and cattle company. The trust deed was immediately placed on record. Before the 31st day of January, 1891, the company, by payments made upon the notes, reduced the amount of the indebtedness which they evidenced to \$5,000. On the last mentioned day, Sam G. Gill, the payee, sold and transferred the notes to Francis E. Talcott. On the 20th day of April, 1892, E. L. Kellogg executed to the cattle company a deed of release of the real estate conveyed by the trust deed. The deed of release recited as its consideration, the full payment of the notes secured by the trust deed; it also recited that it was executed at the request of Sam G. Gill, the payee. It conveyed the title held by the trustee to the company. As a matter of fact, the notes were not paid. On the 24th day of May, 1892, the Grand Mesa company executed a mortgage of the same land to Thomas Lamb, to secure the payment to him, one year from that date, of \$15,000 which he had loaned the company. After the maturity of the debt to him, but at what precise time we are not advised, Lamb instituted proceedings for the foreclosure of his mortgage. The result was a decree in his favor, in pursuance of which the land was sold, himself being the purchaser. Afterwards, but when, we do not know, Lamb sold and conveyed the land to The Delta County Land and Cattle Company, a corporation. In October, 1893, the plaintiff was informed of the fact,

and record, of the release. The last payment on the notes—which was a payment merely of interest due—was received by Mr. Talcott in April, 1892. This suit to cancel the deed of release executed by Kellogg, and foreclose the trust deed securing the notes, was brought by Mr. Talcott on the 26th day of June, 1896. Kellogg, Lamb, The Grand Mesa Land and Cattle Company of Colorado, and The Delta County Land and Cattle Company, were made parties defendant.

The complaint averred that Lamb, with full knowledge that the land conveyed by the trust deed had been released without payment of the money secured upon it, and with intent to defraud the plaintiff, procured the foreclosure of his mortgage, took the title, and, for the purpose of making it appear that the land had passed to an innocent purchaser, conveyed it, without any consideration, to The Delta County Land and Cattle Company, upon which, at the time it received its deed, full knowledge of all the facts was charged.

When the plaintiff had introduced his evidence, the Delta company moved for a nonsuit. The motion was denied, and the company declining to offer any evidence in its own behalf, judgment was entered cancelling the deed of release, and ordering a foreclosure of the trust deed to Kellogg. From this judgment The Delta County Land and Cattle Company has appealed.

In the complaint, the plaintiff's right to relief against the act of Kellogg in releasing the land, is based on the fraudulent practices of Lamb, and the fraudulent acquiescence of the Delta company in his conduct. A decree is sought subjecting and subordinating the title held by that company to the lien of the trust deed to Kellogg, and the sole ground of the plaintiff's claim to such decree, as set forth in his

complaint, is that the Delta company acquired that title with full knowledge that it was procured by fraud, and for fraudulent purposes. I cannot discover in the evidence that Lamb was guilty of the conduct charged against him. It appears that a considerable time prior to the execution of the mortgage to him, he knew of the existence of the trust deed to Kellogg, and knew that the notes had been transferred to the plaintiff; but I am unable to find that when he secured the debt owing to him, he knew or suspected that Kellogg's release did not speak the truth. But conceding that upon the question of Lamb's good faith, the evidence might afford room for a difference of opinion, there was nothing presented to subject the conduct of the Delta company to the slightest suspicion. That it knew anything beyond what the records disclosed, nowhere appears. Upon the plaintiff's own theory of his case, as outlined in his complaint, he is not entitled to relief, and the judgment below should be reversed. But other questions are pressed upon us for decision, and in view of their importance, I deem it well to consider them. These questions are now presented for the first time to this court, and I am unable to find that they have ever been passed upon by the supreme court.

In a number of cases, we have held deeds of release, executed by trustees without payment of the money secured, and without authority from the holder of the debt, to be invalid even as against purchasers who had no actual knowledge of the facts. These cases seem to be relied upon with considerable confidence by the plaintiff; and they will receive attention later. First, however, it will be in order to outline the features of the case before us.

The Grand Mesa Land and Cattle Company by its trust deed of October 19, 1889, conveyed to Kel-

logg the legal title to the land. He was invested by the deed with power in case of default in the payment of the debt, to make public sale of the land and execute a deed to the purchaser. He had no power except that conferred by the deed; and his conveyance to the purchaser at a sale, made in accordance with the requirements of the trust deed, was the only conveyance which that instrument authorized him to make. But he held the legal title, and that title he might vest in another by ordinary deed of conveyance, without the execution of the power, and without special authority from any source.—*Stephens v. Clay*, 17 Colo. 489.

When the debt which a trust deed secures is fully paid, the power of the trustee is extinguished, and the owner of the equity is entitled to a reconveyance of the legal estate. The trustee's deed to a stranger would simply invest the latter with the title the former had. The owner of the equity and the owner of the secured debt would be equally unaffected by it. But a release to the owner of the equity would unite both titles in him. In case the debt has been paid, no question can arise upon the deed of release; but if the debt has not been paid the release is fraudulent. It is no release so far as the owner of the equity is concerned; but his relation to the instrument does not determine the status of an innocent purchaser from him.

It is provided by our recording act that all deeds or conveyances of, or affecting title to, real estate, or any interest therein, may be recorded in the office of the recorder of the county wherein the real estate is situate, and from and after their filing for record, and not before, they shall take effect as to subsequent *bona fide* purchasers and incumbrancers not having notice thereof.—1 Mils' Ann. Stats., sec. 446.

A deed of release is a deed affecting title to real estate within the meaning of the foregoing provision. It conveys a title; and when it is recorded, its effect, as to subsequent purchasers, is the same as that of any other recorded conveyance. A purchaser of real estate is bound to know what the records disclose concerning the title; and if they indicate the existence of some outside condition by which it may be affected, he is bound to investigate; and he is charged with knowledge of the facts to which the investigation would lead. But if, upon their face, the records are complete, and show that the title is good, in the absence of information to the contrary from any other source, he may safely rely upon them.—*King v. Ackroyd*, 28 Colo. 488, 66 Pac. 906; *Porter v. McNabney*, 77 Ill. 235; *Ogle v. Turpin*, 102 Ill. 148; *Howard v. Ross*, 5 Ill. App. 456; *Perkins v. Adams*, 16 Colo. App. 96, 63 Pac. 792.

In *Bank v. Miner*, 9 Colo. App. 361, the recorded release showed upon its face that it was executed at the request, not of the holder of the debt secured, but of a party who had, apparently, no right to make the request. This fact we held sufficient to put a subsequent incumbrancer upon inquiry. In *Kenney v. Bank*, 12 Colo. App. 24, the facts disclosed by the record were that the trustee advertised and sold the land conveyed by the trust deed some seven months before the note which the deed secured was due. The payee of the note—The Colorado Securities Company—purchased the land and received a deed, from which afterwards it caused its name to be erased, and the name of a stranger substituted as grantee. The deed recited a consideration of twenty-five dollars. The land was worth over \$12,000. This stranger then made his promissory note to The Colorado Securities Company for \$4,000, and secured it by trust deed of the land. The note was sold to Kenney. The origi-

nal note was sold long before its maturity to the bank, and the foreclosure of the trust deed securing it was made without the consent or knowledge of the bank. Our judgment was that Kenney, the purchaser of the second paper, was bound to take notice that the foreclosure of the first deed of trust was undertaken before the maturity of the note it secured, and that land worth twelve thousand dollars was sold for twenty-five dollars; and that, having notice of these facts, he was bound at his peril, before purchasing the second note, to ascertain by outside inquiry, that the sale was legitimate, and untainted by fraud. In *Harker v. Scudder*, 15 Colo. App. 69, 61 Pac. 197, William Gorringe executed a trust deed to Alonzo Rice, as trustee, conveying to him certain lots in the city of Denver to secure the payment of his promissory note to Mrs. Scudder for \$1,500, dated December 29, and due one year after date. Afterwards, Gorringe borrowed \$2,000 more from Mrs. Scudder, made his note to her for the amount, dated April 1, 1891, due one year after date, and secured it by another trust deed of the same property to Rice. Two months afterwards, Gorringe applied to Mrs. Harker for a loan of \$2,000, offering to secure it upon the same lots. Mrs. Harker's agent, in examining the title, discovered the two trust deeds to Rice, and she declined to make the loan unless some portion of the property should be released from the lien of those deeds. Thereupon Rice, without the knowledge of Mrs. Scudder, and without the payment of any of the money secured to her, executed to Gorringe a deed releasing four of the lots from the lien of her two trust deeds, reciting that a portion of both notes had been paid. Thereupon Mrs. Harker loaned the two thousand dollars to Gorringe, taking his note for the amount, and, to secure its payment, a trust deed of the four lots released by Rice. Subsequently, Mrs.

Scudder, having discovered that the lots had been released, brought suit to annul the release and reinstate her trust deeds as first liens upon the property. We affirmed the judgment below annulling the release and reinstating the deeds of trust. We held that the fact that the notes were not due, and the further fact that the deed arbitrarily released a portion of the property from the lien of each trust deed, were sufficient to put Mrs. Harker on inquiry. Wilson, J., delivered the opinion of the court, and inasmuch as that opinion is made the subject of considerable comment, I quote from it as follows: "Considering the case purely upon equitable grounds, Mrs. Harker was not an innocent incumbrancer. She knew from the records, or should have known, that the sole power with which Rice, as trustee, was invested, was to sell the property in case of default by Gorringer in payment of the principal of the notes when due, or of the interest, according to its terms. Under the provisions of the instrument, Rice acquired no power whatever, either express or implied, either by the terms of the trust deed or by operation of law, to execute a release deed before the maturity of the debt. Much less did he have any authority to release a part of the property from the operation of the deeds of trust. These were powers which he could exercise only by the express authority of Mrs. Scudder, the owner and holder of the notes, and also of the deeds of trust. This was amply sufficient to have put Mrs. Harker upon her guard. She knew that the notes were executed to Mrs. Scudder, and it was her duty, in order to have protected herself, to have made some investigation or inquiry of Mrs. Scudder, in order to have ascertained whether this power, which was absolutely essential and necessary in order to validate the deed of release, had been given by her. This she did not

do, but relied solely upon the recitals in the release deed."

In that opinion we reiterated what we have frequently said before, and what the supreme court has strongly expressed in *Improvement Co. v. Whitehead*, 25 Colo. 358, namely, that the powers of a trustee depend entirely upon the terms of the instrument appointing him, and no power is conferred unless expressed in the writing. We also said that the authority to execute a release deed is necessarily incident to, and dependent upon, the power vested by the trust deed; that what would destroy or defeat the power to sell, would create the right to release, and that it is only after the power is extinguished by payment that it is possible for the trustee to reconvey the title discharged of the incumbrance. We also approved an expression in the opinion in *Bank v. Miner, supra*, that without authority from the party for whose benefit the trust deed was given, the act of the trustee in releasing it was void. Every utterance of a court must be interpreted by the facts to which it is applied. Under the facts of *Harker v. Scudder*, it was not possible for the trustee to reconvey the title discharged of the incumbrance, and under the facts of *Bank v. Miner*, the act of the trustee in releasing the land without authority from the party for whose benefit the trust deed was given, was void. However, as an abstract proposition, the truth of the statement that a release deed executed without payment of the money secured, or without the request of the owner of the debt, is of no effect, may safely be affirmed. But the question of the right of Mr. Kellogg to release the land in controversy here, or of the effect of his deed upon the title, is not the question to be now determined. The question before us is whether, under the provisions of our recording act, when the record shows a complete and regular chain

of title, a purchaser without any knowledge of the title, except what the record imparts, will be protected in his reliance upon the record.

In each of the cases I have reviewed, the record disclosed some circumstance calculated to excite suspicion, and which demanded inquiry outside of the record; and in each case the necessity of such inquiry, to warrant the proposed purchase or incumbrance, was emphasized in the opinion. But in the case at bar, there was nothing on the face of the record to indicate an imperfection in the title. The debt was past due, the release recited its payment, and persons proposing to invest in the property had the right to presume that, being overdue, it was paid. There is a legal presumption that parties perform their contracts. Upon the record Kellogg appeared to have the proper authority to execute the release. The presumption was that he had such authority, and the record itself did not, nor did it point to anything which did, indicate that a purchaser might not safely rely on the presumption. It has never been held by the supreme court, or by this court, that a person who is not chargeable with knowledge of a defect, and who finds a clear and perfect title upon the record, purchases, nevertheless, at his peril; and such is not the law.

The remaining case to which reference is made—*Barstow v. Stone*, 10 Col. App. 396—is not in point. The only question there was whether a successor in trust could execute a valid release, when no contingency had arisen upon which, by the terms of the trust deed, the title held by the trustee might become vested in him. We held that, having no title, he could convey none; but we declined to pass upon the question of superiority of equity, because it was not in the case.

If not directly, at least by very strong implica-

tion, our supreme court has held that where the records disclose nothing to impeach the release, a purchaser for value, without notice that the instrument was unauthorized, and without notice or knowledge of anything which made it his duty to inquire into the truth of its recitals, will be protected in his purchase. The following were the facts in the case of *Appelman v. Gara*, 22 Colo. 397: Shugart executed a trust deed to Griswold to secure the payment to Gara of a note for \$1,200. Shugart sold and conveyed his equity to Lack, Lack conveyed to McIntyre, McIntyre to Hoffman, and Hoffman to Griswold, the trustee. Without payment of the note, and without authority from its holder, Griswold executed and placed on record a release deed to Shugart which recited that the note had been paid. Griswold then executed a trust deed of the property to McAdams, as trustee, to secure the payment to Appelman of \$1,400. Gara brought suit against Appelman, Griswold and others to set aside the release, and establish the priority of the lien of his own trust deed. The court below awarded him the relief he sought, and in affirming its judgment, the supreme court spoke as follows:

“From the foregoing statement it will be seen that the trust deed to Griswold, given to secure the payment of the note of \$1,200 to Gara, constituted a prior lien upon the property, and the execution of the release deed by Griswold to Shugart, without the payment of the note or the express authority of the holder, was an unwarranted exercise of power on his part, and was ineffectual to destroy Gara’s lien as between him and the grantor, and subsequent purchasers with notice of such abuse of power. The only question, therefore, to be determined is whether Appelman had such notice, or its equivalent, by being put upon inquiry by anything contained upon the re-

cord of the title to the lot. That he did not have actual notice may be conceded, but that he had before him what was equivalent, namely constructive notice from the record, admits of no doubt. The original trust deed, of which he was bound to take notice, disclosed a contract by which the debt thereby secured was not due at the time its release was attempted. And by sundry mesne conveyances in the line of his title he was notified that the equity in the lot was vested in Griswold, the trustee, subject to this trust deed, and held by him subject to this security at the time the release was executed and recorded; that the release to Shugart, who at the time had no interest in the property, was in effect a release to himself. Under this condition of the title, if the trustee's power was not extinguished, it is evident that its exercise was a gross violation of his trust.

* * * With notice, therefore, of the conveyances through which Griswold became vested with the equity in the lot, and of the release of the trust deed by him while such owner, and before the maturity of the note secured thereby, appellant was apprised of facts sufficient to cast a suspicion upon the *bona fides* of the transaction, and put him upon inquiry whether the plaintiff's note had in fact been paid; and he cannot, after ignoring these facts, and dealing directly with the unfaithful trustee in relation to the trust property, invoke the doctrine that courts of equity extend to innocent purchasers without notice."

The foregoing language is hardly susceptible of an interpretation in harmony with the theory of plaintiff's counsel. Upon that theory, the statement that the release was ineffectual to destroy Gara's lien as between him and the grantor, and subsequent purchasers with notice of the abuse of power, is meaningless, because, if the release was an absolute nullity, it would be immaterial whether purchasers

had notice or not; and, in saying that the only question to be determined was whether Appelman was chargeable with notice, and denying his right, with the facts he knew, or ought to have known, to invoke the doctrine that courts of equity extend to innocent purchasers, the court involved itself in singular confusion, if, notwithstanding there is nothing upon the record, or within the knowledge of a purchaser, to excite a suspicion of irregularity, he must, at his peril, ascertain whether the recitals of the release are true. According to counsel's contention, whether Appelman had notice, instead of being the only question, was not a question at all; and the reference to the doctrine which courts of equity apply to innocent purchasers was idle talk. If there can be no innocent purchaser under a fraudulent release, the court could have disposed of the case in a few words by simply saying so; and it is not supposable that with a direct, easy and effectual solution before it of the question involved, it went out of its way to find a subterfuge on which to rest its decision.

Upon the evidence, as it is presented in this record, I think the deed of Lamb to The Delta Land and Cattle Company vested a good title in the latter, and that the court erred in cancelling the deed of release.

Let the judgment be reversed. *Reversed.*

WILSON, P. J., concurs.

GUNTER, J., dissenting.

The Grand Mesa Land and Cattle Company made two promissory notes payable to Gill, and secured the same by trust deed on real estate to Kellogg, as trustee; this, recorded, authorized the trustee to sell on default of payment of notes. The notes were assigned to appellee, plaintiff below. There-

after Kellogg executed a release purporting to discharge the trust deed, reciting payment of the notes, and that the same was made at the request of Gill. Payment had not been made, nor had appellee requested the release. One month after recording of this release the above company mortgaged the land to Lamb; mortgage was foreclosed, Lamb being the purchaser; thereafter Lamb conveyed to appellant.

This proceeding is to cancel the unauthorized release.

Is the release operative against appellee?

The public records charged Lamb and appellant with notice of the trust deed and its provisions.

"The powers of a trustee depend entirely upon the terms of the instrument appointing him; and no power is conferred unless expressed in writing."—*The Bent-Otero Improvement Co. v. Whitehead*, 25 Colo. 358, 54 Pac. 1023; *Kenney v. Bank*, 12 Colo. App. 33, 54 Pac. 404.

The trustee had by the trust deed express power under certain conditions to sell and convey the equitable estate of the trustor; by the same instrument, as an incident to this power, he was impliedly authorized, upon certain conditions, to execute a release discharging the lien of the trust deed.—*Harker v. Scudder*, 15 Colo. App. 69, 61 Pac. 197, 1 Colo. Decisions 670.

"Whatever restrictions or limitations there are upon the expressed power (to sell) it logically follows, attach to all incidents of it (the power to release)."—*Harker v. Scudder*, *supra*.

In *Improvement Company v. Whitehead*, *supra*, the trust deed secured a note; the power to sell of the trustee therein was conditioned on the request of the beneficiary; the trustee foreclosed without this request, selling to a third party. At the instance of the beneficiary the sale was vacated on the ground

that the trustee had no authority to act. It was further held that the innocent purchaser was charged through the record of the trust deed with notice of the limitations on the trustee's powers, and that if he bought in the absence of a performance of the conditions precedent authorizing the trustee to sell, the sale was void. Further, that the recitals in the trustees deed of the satisfying of such conditions did not prove them complied with nor protect the purchaser. The court in the course of its opinion says:

"The assignments of error present but one question, and that is whether a trustee named in a deed of trust, wherein the power of sale is conditioned upon the request of the beneficiary, can sell the land and convey to the purchaser a good title without such request, or without any circumstance from which the purchaser could infer such request on his part. The powers of a trustee depend entirely upon the terms of the instrument appointing him, and no power is conferred unless expressed in writing. Such request, therefore, becomes a condition precedent to his power to sell; and since the rule of *caveat emptor* applies to trustees sales, the purchaser is bound to take notice that all matters *in pais* upon the existence of which the trustee's power to act depends have been complied with."

In *Kenney v. Bank*, 12 Colo. App. 24, 54 Pac. 404, it is said: "The trustee in a deed of trust is clothed with no powers save those which are expressed in writing, and if his authority to act is dependent upon matters *in pais*, parties dealing with the trustee are bound to see that the authority is expressly given by the instrument and that the facts exist which authorize the trustee to act."

It is clear from the authorities that the trustee cannot by sale convey the equitable estate of the trustor or discharge the lien of the beneficiary, under

the trust deed, without complying with the conditions precedent to the exercise of such power. This is true although the purchaser be innocent and the recitals in the trustee's deed declare that he has complied with all conditions precedent in making the sale.

"Parties dealing with the trustee are bound to see * * * that the facts exist which authorize the trustee to act."—*Kenney v. Bank, supra*.

If this be true, that is, that the trustee cannot by foreclosure convey the equitable estate of the trustor, or affect the lien of the beneficiary, without observance of the conditions prerequisite, and, if it be further true, that the power to release is from the same instrument, the trust deed, and that "whatever restrictions or limitations there are upon the expressed power (to sell) it logically follows attach to all incidents of it (the power to release)," how can it be that the trustee can execute a release discharging the lien of the trust deed without complying with the terms of the instrument whereby he derives his authority, and of which instrument and its limitations on the powers of the trustee all parties, by the public records, have notice? The same principle of law which renders the doctrine *caveat emptor* applicable to a purchaser under a trustee's sale ought, and it seems upon authority does apply to releases by a trustee. The reason for the rule in both instances is the information as to the agent's authority furnished by the recorded trust deed.

As I understand the former decisions of this court they sustain this conclusion. In *Harker v. Scudder, supra*, a trust deed to secure a note, with power to the trustee upon certain conditions to sell, was given upon certain lots. A release deed was executed as to certain of the lots, which recited as a consideration therefor, that the payor had discharged part of the secured note, and that the release was

made at the request of the payee therein. These recitals were untrue. The release was recorded. Subsequently a trust deed to secure a new note payable to an innocent party was taken upon the released lots. The beneficiary under the first trust deed brought suit to cancel the release. It was contended by the beneficiary under the second trust deed that she was justified in relying upon the record of the release deed and recitals therein. The court cancelled the release deed and said:

“Whatever may be the rule in other states, and whatever may be the conflict of authority, the rule with reference to the pivotal and decisive question in this case has been positively settled in this jurisdiction by harmonious decisions in both appellate courts. This rule as laid down in *Kenney v. Bank*, 12 Colo. App. 33, 54 Pac. 404, is: “It is undoubtedly true (and in this all the authorities agree) that a trustee by written instrument is clothed with no powers save those which are expressed in the writing; and if his authority to act is in any wise or at all dependent upon matters *in pais*, the parties dealing with the trustee are bound in the one case to see that the authority is expressly given by the instrument, and in the other that those facts exist which authorize the trustee to act.” In a later case this was quoted approvingly by our supreme court. *Improvement Co. v. Whitehead*, 25 Colo. 358, 54 Pac. 1024. In this case the supreme court also says: “The powers of a trustee depend entirely upon the terms of the instrument appointing him, and no power is conferred unless expressed in the writing.” In *Bank v. Miner*, 9 Colo. App. 367, 48 Pac. 839, the court said: “Without authority from the party for whose benefit the trust deed was given, the act of the trustee in releasing it was void.” Applying this rule to the case at bar, it being undisputed that Mrs. Scudder did not

authorize Rice to execute the release deed, it is clear that the deed was not effectual to discharge the incumbrance. It is true that, strictly and technically speaking, the execution of the release deed was not in the exercise of a power expressly vested in the trustee by the deed of trust. The power specially given was to sell in default of payment of the debt by the debtor, and this power could only be extinguished by payment. The authority to execute a release deed is, however, a necessary incident to, and dependent upon, this power. That which would destroy or defeat the power to sell would create the right or authority to release, which is simply a reconveyance by the trustee to the grantor of the title to the property after the fulfillment of the trust. It is only, however, after the trust is carried out, and the power to sell extinguished by payment, that it is possible for the trustee to reconvey the title discharged by the incumbrance. Whatever restrictions or limitations there are upon the expressed power, it logically follows, attach to all incidents of it. Moreover, considering the case purely upon equitable grounds, Mrs. Harker was not an innocent incumbrancer. She knew from the records, or should have known, that the sole power with which Rice, as trustee, was invested, was to sell the property in case of default by Gorringe in payment of the principal of the notes when due, * * *. Under the provisions of the instrument, Rice acquired no power whatever, either express or implied, either by the terms of the trust deed or by operation of law, to execute a release deed before the maturity of the debt. Much less did he have any authority to release a part of the property from the operation of the deeds of trust. These were powers which he could exercise only by the express authority of Mrs. Scudder, the owner and holder of the notes, and also of the deeds of trust. This was

amply sufficient to have put Mrs. Harker upon her guard. She knew that the notes were executed to Mrs. Scudder, and it was her duty, in order to have protected herself, to have made some investigation or inquiry of Mrs. Scudder, in order to have ascertained whether this power, which was absolutely essential and necessary in order to validate the deed of release, had been given by her. This she did not do, but relied solely upon the recitals in the release deed."

I have quoted thus at length the portions of the opinion pertinent to the questions before us, that it may be seen how the court reasoned, and what it ruled. It seems to me that the ruling there made, and the reasoning therein justifying such ruling, if applied to the facts of the case under consideration, would necessitate a cancellation of the Kellogg release deed.

In Kenney v. Bank, 12 Colo. App. 25, 54 Pac. 404, the facts, so far as material to one of the grounds of the ruling therein, were: A trust deed securing a note was foreclosed without the knowledge or consent of the beneficiary, the bank; a trustee's deed placed of record, and a note and trust deed executed by the grantee hypothecated for value to another party, Kenney. On application of the beneficiary under the foreclosed trust deed, the bank, the foreclosure was set aside. One of the grounds for granting the relief was that the trustee had no power to make the sale; this it was held vitiated the sale even as against Kenney who took the note and trust deed without knowledge that the trustee had not complied with the conditions prerequisite to the sale. The court said:

"It was Kenney's duty to see not only that the power was granted but that the facts which authorized its exercise likewise existed. Under the proof

neither existed. The note was not due, and therefore the trustee had no authority to sell to enforce the payment of it, unless there had been a default in the payment of the interest, and the holder had elected to declare the whole sum due. The latter was undoubtedly a matter *in pais*. The logical deduction is that as an original proposition the sale was wholly and totally invalid, did not affect the bank's title, nor by the execution of the security by Duffy did Kenney acquire any interest. * * * We therefore conclude upon these authorities that there was enough in the transaction to put Mr. Kenney upon inquiry, and that he was not an innocent purchaser for value without notice, *and that even had he not been put upon inquiry by these matters*, the trustee had no authority to sell when he did. The facts which were prerequisite to the exercise of such *authority did not exist. This being true the trustee could in no way dispose of or incumber the property to the disadvantage of the original lienor.* The lien of the Jefferson County Bank was therefore superior to that held by Mr. Kenney."

In *Bank v. Miner*, 9 Colo. App. 362, 48 Pac. 837, the facts so far as material to this citation are: The note of Miner, payee First National Bank, with Shimer thereon as surety, with reference to Miner, was secured by a trust deed. This recited its giving to secure the note, and to secure Shimer in his suretyship. A release of the trust deed was executed by the trustee wherein he recited payment of the note and that the release was executed at instance of Shimer. The note had not been paid and the payee therein, the bank, had not authorized the release of the trust deed. While the release was of record a trust deed was executed to secure a third party. The beneficiary under the first trust deed, the bank, brought suit to cancel the release. The court said:

"The release executed by Morse recited that W. A. Miner had fully paid and satisfied the original note. This recital was not true. * * * At the time the release was written it was unpaid, and it is still unpaid. The release also recited that it was made at the request of Frank Shimer. Shimer had no authority to order a release. As he had not paid the debt, the security did not belong to him. Its release could be legally authorized only by the bank, the holder of the debt; and the paper did not purport to be executed by its authority. Without authority from the party for whose benefit the trust deed was given, the act of the trustee in releasing it was void. The mortgage to the Union Bank of Greeley was executed before this supposed release was made; but even had it been executed subsequently, as was the case with the mortgage to Bronk, the recital in the releasing instrument that it was executed at Shimer's instance, and the absence of any appearance of authority from the owner of the debt, would have made it its duty to inquire into the facts, if it intended its mortgage to be a prior lien."

Judgment was entered cancelling the release. If the note secured by the first trust deed had been paid then the release was properly executed, and was effective in discharging the lien of the trust deed. If the recitals in the recorded release were conclusive upon the beneficiary under the first trust deed, First National Bank, as to the fact of payment, then the release could not be questioned at the instance of such beneficiary, yet, at the instance of such beneficiary the court cancelled the release deed. In effect its holding was that the release was void because unauthorized by the beneficiary under the trust deed; that the recitals in the release deed, of payment of the note, although the release was recorded, were not proof of such fact in favor of a subsequent incumbrancer.

In *Barstow v. Stone*, 10 Colo. App. 396, 52 Pac. 48, the release deed was executed by a successor in trust; it recited facts which, if true, authorized him to execute the release deed. This went of record. The facts recited as to his authority to act were false. At the instance of the beneficiary under the trust deed released, the release was cancelled against a subsequent incumbrancer for value without knowledge of the falsity of the facts recited in the release deed.

As to *Appelman v. Gara*, *supra*, it was not necessary for the court to decide therein the question before us, and in my opinion it did not decide it. The release was cancelled upon the ground that the facts were sufficient to charge a subsequent innocent purchaser with notice.

If section 446, 1 Mills' Ann. Stats., validates the release deed in the present case as against appellee, Talcott, and in favor of appellant, I am unable to see why it did not cure the various unauthorized instruments placed of record in the above cases. This section, in my judgment, has no greater effect upon the release deed in the present case than it would have upon a forged instrument.

Three Illinois cases are cited in support of the opinion of the court herein. In my judgment they are not in point. In *Porter v. McNabney*, 77 Ill. 235, the grantor in the trust deed securing the note conveyed the encumbered premises to the party shown by the records to be the holder of the note thus secured. To this beneficiary the trustee likewise released. The laws of Illinois required an assignment of the note secured by trust deed to be placed of record to render such assignment of the note and trust deed valid against innocent parties. The land was conveyed by the party shown by the records to be the holder of the note and to whom deed of release was executed, and to whom the grantor in the trust deed had conveyed

his equity, to an innocent third party. The court declined to cancel the release deed at the instance of the one claiming to hold the note secured by the trust deed, and who claimed the release as unauthorized, the reason being that every one shown by the records to be interested in the trust deed, that is, the beneficiary thereunder, the trustor and the trustee had all in effect, by the several conveyances, consented to the release. The beneficial interest of the record holder of the note, the equitable interest of the trustor, and the legal interest of the trustee had all united in the party shown by the recitals to be the beneficiary under the trust deed. Had the assignee of the note placed his assignment of the note and trust deed of record, a different question would have been presented.

Our statute did not require appellee, Talcott, to record his assignment of the note or trust deed; such recording was not necessary to protect the assignment to him against a subsequent lienor.—*Kenney v. Bank, supra*.

A statement of the facts in *Ogle v. Turpin*, 102 Ill. 148, distinguishes it from the case before us. Runyan held notes payable to himself by Allen secured by mortgage on lands. The notes Runyan endorsed to Ogle: The statute required the assignment of the notes and mortgage to go of record in order to be valid against third parties without notice. This was not done. Runyan obtained a deed for the mortgaged premises from Allen. Runyan thereupon, without the knowledge or consent of Ogle, on his (Runyan's) apparent title, which appeared perfect of record, obtained a loan from another party giving trust deed with usual power of sale to secure the same. Ogle brought suit to foreclose his released mortgage. The court dismissed the bill, upholding the release. The court *inter alia* said:

“As the record stood it showed that Runyan was the owner of the title free from encumbrances. The assignment of the notes operated as an equitable assignment of the mortgage, and the assignment was an instrument that related to or affected the title of the land, and to be come operative as to creditors and purchasers the assignment of the mortgage should have been formally made and recorded to charge notice to all persons dealing with the title, or at least the assignment on the note should have referred to the mortgage, and that assignment should have been recorded. As between the parties the mere assignment without recording was all that was required to assign the mortgage, but as to strangers it was otherwise.”

As our statute did not require an assignment of the notes and mortgage to Talcott placed of record to make it effectual as to strangers, Lamb was not justified from the silence of the record in believing that Gill was still the owner of the notes and the proper party to authorize the release.

In *Howard v. Ross* the release was executed by the party alone entitled, according to the records, to execute the release, and was authorized by the only party, according to the records, entitled to authorize the release. The assignee of the securities in such case, as in the two Illinois cases, had failed to effectuate his assignment as to strangers by complying with the statute requiring its record.

The facts herein summed up are: Appellee held a note secured by a recorded trust deed; without his knowledge or consent the trustee executed and placed of record a release. Thereafter appellant, by mesne conveyances from the trustor, acquired the encumbered property. Appellee asks, appellant resists, the cancellation of the fraudulent release.

The appellee has done all the law required of him to preserve his security; he is without fault.

Through the public records appellant knew of the trust deed and of the limitations therein placed upon the powers of the trustee; it knew the law to be that the trustee had no power to release without the consent of appellee; it knew that the facts constituting this consent rested *in pais*; that if it relied on the existence of these facts without investigation it did so at its peril.

"If the validity of the deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain, which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title."—*Williams v. Peyton*, 4 Wheaton 77, approved in *Kenny v. The Bank* and in *Improvement Company v. Whitehead*, *supra*.

"There is no principle which substitutes the declaration of the trustees, however solemnly made, in place of the fact which could alone authorize them to recover. The purchaser, if he would be safe, must not content himself with the recital that the trusts have ceased, but must ascertain at his peril whether such is the case."—*Briggs v. Davis*, 20 N. Y. 15.

Although forewarned by the contents of the trust deed and the law, appellant made no investigation as to the existence of facts authorizing the trustee to release. The trustee had no authority to release. Appellant, the party in fault, is the one who should suffer by the fraudulent release.

It was not the purpose of our recording act to give validity to a forged or unauthorized instrument. The records might contain a forged deed; an innocent

purchaser might become the grantee thereunder, yet, it would not be contended that our recording act would give validity to the forged instrument and deprive the true owner of the same through such forged deed. A public record is not a warranty of title, but is merely a means afforded by law of giving constructive notice to the world of the execution of any given instrument appearing thereon, leaving the question of validity of such instrument, should the same become material, to be determined wholly independent of the record itself.

In my opinion the judgment of the lower court should be affirmed.

[No. 2103.]

**THE HENDRIE & BOLTHOFF MANUFACTURING COMPANY
v. THE HOLY CROSS GOLD MINING AND MILLING
COMPANY ET AL.**

Mechanics' Liens—Mines and Mining—Contract to Sell—Improvements by Purchaser.

Where a mine owner leased certain mining property with an option to purchase and the contract was in effect, a contract for the sale of the property with an obligation on the part of the purchaser to operate the mine and to invest the proceeds in the improvement of the property, and for the purpose of developing and improving said property, the purchaser purchased and attached to the property certain mill fixtures, an ore crusher, ore cars, drills and drill supplies, and the purchaser having forfeited his contract, the owner took possession of the property with all the improvements, the dealer who sold to the purchaser the mill fixtures, etc., was entitled to a lien on the interest of the owner of the mine in the property for the price of the material so furnished.

Appeal from the District Court of Arapahoe County.

MR. R. D. THOMPSON and MR. CHARLES J. BLAKENEY, for appellant.

MESSRS. CARPENTER & MCBIRD, for appellees.

GUNTER, J.

Appellee Howe, as owner, leased to Kimball and Havens, for a term of three years, certain mining property with the buildings, mills, machinery, tools and other equipments theretofore used in mining the same. The lease provided an option of purchase. Obligations of the lessee, imposed by the lease and pertinent to this ruling were to mine, operate and develop the property; to keep books of account wherein should be set down in detail all the expenses of operation, the amount paid for each item of mining supplies, tools, repairs and improvements, and to keep all buildings, machinery and structures in reasonable repair during the term.

The lease further provided for a forfeiture of the lease and option in the event of a breach of any of the covenants thereof. The lease ran from October, 1892. September, 1893, it was extended for one year. July, 1894, it was assigned to Davis, trustee, and August, 1894, was by him assigned to The Holy Cross Gold Mining and Milling Company. This company immediately after the assignment to it, entered into possession of the demised premises and remained in possession thereof until October, 1897. July, 1895, a contract between Howe and the Holy Cross company was entered into extending the original lease and contract three years, whereby Howe agreed to sell and the company to buy the demised premises, and to make payment therefor on or before October 1, 1899. Until the determination of this contract by time, payment or forfeiture, the company covenanted to mine and operate the premises, and to devote all of the proceeds of ore extracted therefrom to the permanent development of the property, unless the proceeds so realized were in excess of the amount that could be so expended, in which event such surplus was to be divided between the vendor and vendee.

Except as modified by this extension contract, the

terms of the original lease and contract were adopted as a part of the new agreement. Under the new agreement the future relation between the parties thereto was that of vendor and vendee.

September, 1897, the Holy Cross company having violated the terms of the new contract, Howe declared the contract forfeited and resumed possession of the property covered thereby, taking possession also of all improvements thereon.

The Holy Cross company while in possession of the premises under the contract to purchase, of July, 1895, and while mining and operating the same for "the sole purpose of developing and improving the same, and to advance and carry out the objects and purposes for which the said property is valuable only, and as a part of the mining enterprise embraced in all of the demised premises," as admitted by the answer, purchased and attached to the property, and used in operating the same, certain mill fixtures and an ore crusher. It also for the purpose of operating the property and developing the same, under the terms of the extension contract—the contract to purchase—bought for the property ore cars, drills and drill supplies. A lien was sought against the interest of the owner, Howe, in the premises for the mining equipments and supplies so furnished. This the lower court denied. From the ruling is this appeal. There was no evidence, the above facts appear from the pleadings.

From the foregoing facts it appears that Howe agreed to sell and the company to buy the premises; that the company was authorized by, and obligated to the vendor to mine, operate and improve the property; that such obligation was one of the conditions of the contract of purchase; that all proceeds of the mining were to go into the improvement of the property; that after the original lease had become a con-

tract to purchase, in carrying out such contract the Holy Cross company made the improvements and purchased the supplies for which the lien is claimed, and for which such company is indebted to appellant.

Considering the character of the property leased, the apparent manner, from its equipments in which it had prior to the lease and contract been operated, the length of the terms for which the contracts to the original lessee and the assignee ran, the fact that the property was to be kept up, the parties must have contemplated that in operating and developing the property it would be necessary to purchase mill fixtures and other mining equipments and supplies. In carrying out the obligation to operate, develop and improve this property it was as necessary to have mining supplies and equipments as it is necessary to have building materials and workmen in carrying out a contract to erect a building upon land. There was authority by the vendor and an obligation by the vendee to make the improvements in question, such obligation was one of the conditions of the contract to purchase.

The facts bring this case within *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942.

In first cited case Hull agreed to sell and Leimbach to buy certain lots, upon which the latter agreed to erect houses. Materials were purchased for construction of such houses and a lien claimed therefor against the interest of Hull in the land, he having taken possession of the premises and improvements on account of the forfeiture of the contract of sale. The court said: "The district court by its decree limited the operation of the liens of the mechanics and material men to the structure itself, and refused to extend the same to the lots. This would be proper if Hull had merely sold the lots, leaving it with Leim-

back to improve them or not, as he might elect, as the rule is well settled that the lien in such case attaches only to the interest of the one who causes the improvement to be made; but in this case, by the contract of sale, Leimbach was not only authorized to construct the houses, which he afterwards did construct, but he was required so to do. In other words, the building of the houses was not only authorized, but enjoined, by Hull, the owner of the land, by the very terms of the written contract.

“Under these circumstances the interest of the vendor in the real estate, as well as that of the vendee, became subject to the liens of those furnishing the labor and materials for the construction of the houses under the contract of sale.”

In the Taylor case, *supra*, an original lease contained an option to purchase, the option merged into a contract by the one party to sell and by the other to buy. As a condition of the contract the proposed purchaser was obligated to place certain machinery upon the property involved. In pursuance of the contract the machinery was purchased and placed upon the property. The option contract was forfeited and the vendor took possession of the property in its improved condition. The contractor furnishing the material claimed a lien upon the interest of the vendor in the land for the amount due upon the machinery. The court held it entitled to the lien.

We think the lower court erred in failing to decree the lien herein.

The above facts appear from the pleadings. No reason appears for a new trial.

The judgment will be reversed with instructions to the court to enter judgment for plaintiff for the amount prayed, and for a lien of such judgment upon the Pelican Extension and Little Mollie lodes, and the mill located thereon.

Reversed.

[No. 2521.]

THE CITY OF DENVER ET AL. V. HUBBARD.

1. Cities and Towns—Contracts—Lights—Indebtedness—Constitutional Limitations.

A contract between a city and an electric light company providing for the lighting of the streets of the city by the company for a term of ten years at a stipulated price per year for each light with an obligation on the part of the city to use not less than a certain number, if a debt at all within the meaning of section 8, article 11 of the constitution, limiting the amount of municipal indebtedness, the extent of the debt is only the amount of the annual payment provided for, and not the aggregate amount of the total minimum payments to be made during the ten years.

2. Same—Appropriations.

Under the provisions of a city charter that the city council shall not order the payment of any money for any purpose in excess of the amount appropriated for the current year, nor make any contract imposing upon the city any liability to pay money, until a definite amount of money shall have been appropriated to liquidate all pecuniary liability of the city under such contract; where the city charter expressly empowered the city council to provide for lighting the streets and public buildings, a contract providing for the lighting of the streets for a term of ten years is not invalid because of a failure of the city council to make a prior appropriation to cover the liability created thereby for the entire term of the contract, but it is sufficient if an appropriation is made each year to cover the annual payment for that year.

3. Cities and Towns—Lighting Contracts—Reasonable Term.

A city has authority to contract for the lighting of its streets and public buildings for a reasonable number of years, although its charter does not expressly authorize it to make such contract. And where there is no express limit upon the power of the city council as to time, the court should not interfere with the judgment and discretion of the city council in fixing the term of such a contract unless it clearly appears that there was an abuse of discretion. Ten years held not an unreasonably long term for such contract.

4. Same—Monopoly.

A contract between a city and electric light company providing for the lighting of the streets of the city for a term of ten years, and granting the company the privilege of constructing

and operating in the city a commercial electric light and power plant for the purpose of furnishing light and power to the residents of the city is not invalid on the ground that it tends to create a monopoly.

5. Cities and Towns—Lighting Contracts—Powers of City Council.

A contract by a city to secure the lighting of its streets is in the exercise of its business powers as distinguished from its governmental functions, and such a contract for a term of years is not objectionable as a surrender by the city council of its legislative powers.

6. Same—Board of Public Works.

A city charter creating a board of public works which is given exclusive management and control of all public and local improvements and among other things the "erection of poles, stringing of wires, laying of tracks, pipes and conduits for wires whether done by the city, corporation or individuals," does not take away from the city council and confer upon the board of public works the power to contract for lighting the streets and public grounds of the city where the power to provide for such lights is expressly granted to the city council by the charter.

7. Cities and Towns—Lighting Contracts.

A contract between a city and electric light company for lighting the streets and public grounds of the city will not be held invalid as unnecessary, excessive and unreasonable because a competing company which had been furnishing light to the city at a higher price offered to furnish the lights at a cheaper rate than that provided in the contract, such offer being made after the contract had been entered into and the contracting company had expended large sums of money towards constructing its plant, but before the ordinance legalizing the contract was finally passed by the city council.

Appeal from the District Court of Arapahoe County.

MR. H. M. ORAHOD and Mr. H. L. RITTER, for appellant, the City of Denver.

MR. HENRY J. O'BRYAN and Mr. H. RIDDELL, for appellant Lacombe.

MESSRS. YEAMAN & GOVE, for appellee.

WILSON, P. J.

On and prior to February 14, 1901, there was in

the city of Denver only one electric light and power plant capable of supplying an electric current for the lighting of the streets of the city, the homes of its inhabitants, and for commercial purposes generally. Up to January, 1900, this company under contract with the city had lighted the streets, receiving therefor the sum of one hundred dollars per annum for each arc light. Subsequent to this time, and up to the completion of the new plant hereinafter mentioned, the company had furnished such street lighting, but not under contract with the city, and had been receiving therefor the sum of ninety dollars per annum for each arc light. On February 14, before mentioned, the council of the defendant city passed an ordinance whereby Charles F. Lacombe, one of the appellants, and his assigns, were granted the right and privilege to construct, maintain and operate in the city a street arc electric light and power plant, and also a commercial electric light and power plant, for the purpose of producing and transmitting an electric current for lighting, heating and power purposes, for use of the said city of Denver, and residents and citizens thereof, and to erect poles, string wires, etc., along the streets and alleys of the said city for this purpose. Specifications and conditions were inserted as to where and how the plant should be constructed, its kind, capacity, etc. The ordinance further provided for, and upon its acceptance by Lacombe and his assigns was a contract between the city and Lacombe for lighting the streets, and a similar contract, other than the one arising from the acceptance of the ordinance was executed between the city and Lacombe. The construction of the arc lighting plant was to be completed within ninety days, and of the commercial plant within four months from the passage of the ordinance. The contract was for the lighting of the streets of the city for a period of

ten years at the price of \$7.50 per month, or \$90.00 per annum for each arc light, and for such additional arc lights in excess of one thousand as might be required by the city during the continuance of the contract, the sum of \$70.00 per year per arc light. The city covenanted that it would use not less than one thousand arc lights. The ordinance and contract reserved the right to the city to purchase the arc lighting plant at the end of any year at a constantly reducing price, which was fixed for each year in the contract, and it was also provided that the plant should not be sold to or combine with any other electric lighting plant in the city. With reference to the commercial plant, a maximum rate to be charged private consumers, residences, business houses, etc., was fixed, and it was provided that the city might purchase this plant at the end of five-year periods, at a price to be fixed in manner provided in the ordinance. It was further agreed that Lacombe and his assigns should pay into the city treasury three per cent per annum of the gross revenues that might be received from the commercial plant. In an agreed statement of facts, it was stipulated that the city had not at any time appropriated a definite sum of money, or any amount of money whatever, for the liquidation of any liability which it might incur by reason of such ordinance or contract, unless the ordinance itself operated as an appropriation, except by the passage of the annual appropriation ordinance of the city on January 17, 1901, which contained the following provision:

“Electric Light and Gas. There is hereby appropriated to the electric light and gas department the sum of ninety thousand dollars (\$90,000) for the public lighting of the streets of the city of Denver by arc electric lights of two thousand standard candle-power, running all night, every night in the year, and also for

the payment of gas and electric light bills in the different city buildings, outside of the fire and police departments. Provided, that not more than one-quarter of said amount shall be expended in any one quarter of the year, unless authorized expressly by the city council. Provided, further, that not more than ninety dollars each per annum shall be paid for arc electric lights of two thousand standard candle-power each. And the city council hereby reserves the right to direct the expenditure of the amount hereby appropriated as said council may from time to time determine."

It was further stipulated that neither the contract with Lacombe and his assigns, nor the expense to the city resulting therefrom, was rendered necessary by any casualty, accident or unforeseen contingency happening after the passage of the last annual appropriation ordinance by the city council of the city of Denver, and that neither the ordinance nor the contract had ever been recommended or approved by the board of public works, nor had the said board of public works, nor the city, nor any officer or department thereof, in any manner advertised for bids for lighting the streets and public grounds of the city. It was further stipulated that the ordinance was passed and the contract entered into by the city in order to afford the city and its inhabitants the benefit of competition in the price of electric light and power between the old company and the proposed new company; and that it was impossible to secure the benefits of such competition and the erection of a competing plant, without entering into the contract set forth in the ordinance, with Lacombe and his assigns, or some other company, corporation or person. Also, that since the commencement of this action, the old company had for the purpose of meeting the competition afforded by defendant Lacombe and his as-

signs, materially reduced the rates charged by it for commercial lighting. It was also agreed that at the time of the commencement of this action, the amount of the appropriation for the lighting of the streets and buildings of the city in the annual appropriation ordinance of January 17, 1901, remained unexpended, with the exception of about eleven thousand dollars paid out for lighting subsequent to January 1, 1901. The plaintiff, a taxpayer of the city, commenced this suit February 16, 1901, assailing the validity of the ordinance and contract, and praying an injunction restraining the defendants from carrying it into effect. The decree of the court granted the relief substantially as prayed for, the contract being held null and void, and from this defendants appeal.

To establish the invalidity of this ordinance and contract, the grounds chiefly relied upon are:

1. That it was in violation of and prohibited by the constitution of the state.
2. That it was and is prohibited by the charter of the city of Denver.

There are some other objections which possibly may not in terms come strictly within these two grounds, but they will be adverted to and considered during the course of this opinion.

1. The constitutional objection is based upon the provision of the state constitution limiting the extent and amount of municipal indebtedness, it being claimed that this contract would operate to create a municipal indebtedness in excess of the constitutional limit.—State Constitution, art. 11, sec. 8.

It was stipulated that at the time when the contract was entered into, the indebtedness of the city had not reached the constitutional limit by the sum of \$225,000.00. If therefore the contract created an indebtedness such as was embraced within the constitutional inhibition, and such indebtedness was for the

aggregate amount of the total minimum payments to be made during the ten-year life of the contract, to wit, the sum of nine hundred thousand dollars, it is apparent that the constitutional limitation would of course be exceeded. If, however, even though it be conceded that the contract did create a debt within the meaning of the constitution, but the debt was only in the amount to be paid in any one year, to wit, ninety thousand dollars, then the indebtedness so created would not exceed the constitutional limitation. There is much force in the contention that a contract like this does not create a debt within the meaning of the constitution, and that no debt exists or comes into being until after the expiration of a period fixed in the contract for payment, and this is the view taken by many highly respectable authorities. It is not necessary, however, for the determination of this appeal that this question should be considered and definitely passed upon. It is immaterial for the purposes of this case how that question may be settled, because if the mere execution of the contract created a debt at all within the purview of this constitutional provision, the extent of the debt was only the amount of the annual payment provided for, which is ninety thousand dollars, and hence it was clearly and safely within the prescribed constitutional limitation. This doctrine, which has been much discussed, and frequently passed upon, is as applied to this class of cases founded upon sound reason and principle, and is supported by an overwhelming weight of authority. We cite in support of it a number of the leading and best considered authorities, but by no means all.—*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 19; *Saleno v. City of Neosho*, 127 Mo. 639; *Water & Light Co. v. City of Lamar*, 140 Mo. 156; *Carlyle W. L. & P. Co. v. City of Carlyle*, 31 Ill. App. 339; *Crowder v. Town of Sullivan*, 128 Ind. 487; *Seward v. Lib-*

erty, 142 Ind. 554; *City of Helena v. Mills*, 94 Fed. 919; *Dwyer v. Brenham*, 65 Tex. 526; *Stedman v. City of Berlin*, 97 Wis. 512; *McBean v. Fresno*, 112 Calif. 167; *Chicago v. Galpin*, 183 Ill. 407; *Cunningham v. City of Cleveland*, 39 C. C. A. 218; *Water Works Co. v. City of Utica*, 31 Hun, 426; *Water Supply Co. v. City of Ludington*, 119 Mich. 481; *Appeal of the City of Erie*, 91 Pa. St. 398; *Smith v. Dedham*, 144 Mass. 177; *Gas Light Co. v. New Orleans*, 42 La. Ann. 188; *Grant v. City of Davenport*, 36 Iowa, 396; *Earles v. Wells*, 94 Wis. 285; 1 Dillon, Mun. Corp., 4th ed., § 136a.

In the Walla Walla case, in which all of the justices concurred in the opinion, it was said, after referring to a few cases which hold the contrary doctrine: "But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case, the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed. In the case under consideration, the annual rental did not become an indebtedness within the meaning of the charter, until

the water appropriate to that year had been furnished."

In an elaborate note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 223, by Judge Freeman, the distinguished legal author, on this subject of what is within the meaning of prohibitions against municipal indebtedness, it was said on page 240: "But where the contract or ordinance is one intended to provide for the furnishing of the municipality with water to be used for public purposes, or with lights for the streets or other public places, and payment is to be made for such water or lights from year to year, this is but a mode of providing for the necessary current expenses of the municipal government, and while it is true the municipality has no discretion not to become liable from year to year for the amount which it has agreed to pay, yet the almost overwhelming weight of authority is that it is not to be regarded as indebtedness within the meaning of these constitutional or statutory limitations, except for the amount which has actually fallen due under the contract or ordinance, and that it must therefore be sustained, although the amount which will ultimately become due under it may greatly exceed the limit of indebtedness which the municipality is authorized to incur."

In *Saleno v. City of Neosho*, *supra*, cited approvingly in the Walla Walla case, *supra*, the court said: "A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and if not furnished, no payment could be required of it."

There are some cases to the contrary, but upon close examination it will be found that in the great majority of them the decision turned upon the fact that the municipality at the time of making the contract had already reached the limit of its indebtedness, or so nearly so, that the making of the first annual payment would have carried it beyond such limit, or that in the constitution other language or words beside the mere word "debt" or "indebtedness" was used, showing an intent to give to the word "debt" a more extended meaning and broader significance than that usually accorded to it. Nearly all are susceptible of some explanation which shows them to be not in conflict with this doctrine. Such are the Montana cases, cited by the appellee—*Davenport v. Kleinschmidt*, 6 Mont. 502; *State v. Helena*, 24 Mont. 521.

Both of these cases were considered by the federal circuit court of appeals in a late Montana case, *City of Helena v. Mills*, 94 Fed. 917. It was there said, referring to them: "Both cases are in harmony with the general doctrine, established by the decided weight of authority— that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned, but that if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor."

Lake County v. Rollins, 130 U. S. 662, is explained in the Walla Walla case, *supra*, and held not to be in conflict with the doctrine announced in the latter case.

Niles Water Works v. Niles, 59 Mich. 313, is cited as maintaining the contrary doctrine. The question there presented though somewhat similar, was not exactly like the one now under discussion. The case seemed to turn upon the exceedingly broad and comprehensive language used in a provision of the charter of the defendant city under consideration. However this may be, the Michigan supreme court in a much later and very recent case, *Water Supply Co. v. City of Ludington*, *supra*, passed directly upon the question here presented. It said: "The charter itself limited the authority of the council with respect to incurring indebtedness, but the rule that a contract for future services to be paid for as rendered is not an incurring of indebtedness, is supported by binding authority." In support of this, the court cited a number of authorities which are cited in the Walla Walla case, and which we have cited in this.

In *Water Co. v. Salem*, 5 Ore. 29, the charter inhibition involved was as broad and comprehensive as language could make it. The city was prohibited from creating "any debt or liabilities which shall singly or in the aggregate exceed the sum of one thousand dollars." The case arose upon a contract for water whereby the city bound itself to pay in quarterly installments eighteen hundred dollars per annum for a period of seventeen years. The main and only question to be determined was whether *any* debt or liability was created by the contract. Upon that question only the case is authority, but that is not the question before us. Manifestly if that contract created a debt or liability for one year only, it would have been void, because the debt or liability would have been in excess of the amount allowed by the city charter. Whether the debt or liability, if created, would have been only the amount to be paid during one year, or the sum of the payments provided to be

made during the entire seventeen years, was not in the case.

There are a few cases of very respectable authority squarely to the contrary, notably one from Georgia, *City Council v. Dawson Water Works Co.*, 106 Ga. 697, 32 S. E. 907. This involved a contract by the city for water, annual payments for which in specified amounts were to continue for a period of twenty years. It was held that within the meaning of the state constitution and intent of its framers, the contract created a debt the aggregate amount of which was the sum of the annual rentals stipulated to be paid during the entire term, and therefore that it was illegal and not binding except for the first year. It plainly appears that in reaching this conclusion the court was influenced to a large extent by a consideration of the history of the peculiar state of public affairs existing in Georgia antecedent to and concurrent with the adoption of the constitutional inhibition. This it was held clearly evidenced the intent of the convention to have been in accord with the conclusions of the court. It was frankly stated in the opinion, however, (p. 914) that the ruling of the court was "in direct conflict with a decision of the highest court in the land as well as with the current of American authority on the subject." It does not appear to us from current history or otherwise that the condition of public affairs in Colorado at the time when its constitution was adopted was such as to justify us in following the Georgia precedent and in thereby ignoring the current of American authority, including a unanimous decision of the highest court in the land.

Finally, it may be said as showing that the doctrine announced by the weight of authority is supported by reason and principle, that a contrary holding would, it is a matter of common knowledge, in numerous instances work disaster to municipalities

and their inhabitants. Water and light are absolute necessities in towns and cities, as essential almost as air, and the construction and operation of plants for these necessities, it is universally known, require the expenditure of very large sums of money. As a business proposition, susceptible of being understood by those of ordinary intelligence only, it is also universally known and recognized that a town or city is unable to secure the erection of the necessary plant unless it is able to contract in advance with such person or company to use light to be furnished for some period of time. As said by this court in *Gas Company v. Leadville*, 9 Colo. App. 403: "If a city were not allowed in such case to contract for light for some reasonable period of time, and the individual or company furnishing light was compelled to trust for his compensation from year to year to the varying moods of city councils, it is safe to say that no one would engage in such a hazardous enterprise."

For these reasons, we believe that neither the ordinance nor the contract was obnoxious to the state constitution.

2. Was the contract invalid and void *ab initio* because of the failure on the part of the city council to make the necessary prior appropriation of money to cover the debt or liability created thereby, as required by section 10, article 6, of the city charter then in force, which reads as follows:

"The city council shall not order the payment of any money for any purpose whatever, in excess of the amount appropriated for the current year, and at the time of said order remaining unexpended in the appropriation of the particular class or department to which such expenditures belong. Neither the city council nor any officer of the city shall have authority to make any contract, or do anything binding on the city, or imposing upon the city any liability to

pay money, until a definite amount of money shall have been appropriated for the liquidation of all pecuniary liability of the city under any such contract, or in consequence thereof; said contract to be *ab initio* null and void as to the city for any other or further liability;

“Provided, first, that nothing herein contained shall prevent the city council from paying any expense, the necessity of which is caused by any casualty, accident or unforeseen contingency, happening after the passage of the annual appropriation ordinance; and second, That the provisions of this section shall not apply to or limit the authority conferred by sections 7, 8 and 9 of this article, nor to moneys to be collected by special assessments for local improvements.”

Sections 7, 8 and 9, which are excepted from the provisions of this section, are sections empowering the city to contract indebtedness for any one or more of various purposes specifically mentioned therein, but public lighting is not one of them. It is admitted that in January, immediately preceding the time when this contract was entered into, the city council in its annual appropriation bill included an item of \$90,000.00, for the public lighting of the streets of the city by electric lights, and also for the payment of gas and electric light bills in the different city buildings during the current year. It is true that it was not recited in the bill that this appropriation was for the express purpose of paying the bills which might be incurred under this contract, designating the company or contractor by name, but we think this was not necessary. It covered the subject of lighting, and that was entirely sufficient to meet the requirements of the section which we have quoted, so far as the expense incurred under this contract for lighting during the first year was concerned. It is contended,

however, by counsel, and it was upon this ground that the trial court based its judgment, that as the contract was to run for ten years, in order to have validated it the appropriation should have been for the total amount that the city would have to pay to the company during the entire ten years if it complied with its contract, to wit, the sum of nine hundred thousand dollars. Even though we should hold, as we have done, that the contract was not obnoxious to the constitutional provision fixing a limit of indebtedness, because the indebtedness within the meaning of that provision was only from year to year, counsel urge that the section of the charter which we have quoted covers the aggregate amount of the indebtedness to be incurred for the entire term of years, because the word "liability" is used in the section, and not "debt" or "indebtedness." It is insisted that the word "liability" has a much broader and more extended significance than the term "debt." This is true, and we have no dispute with or criticism of the argument of counsel to that effect, or the authorities cited by them in support of it. It is equally true, however, that the words are sometimes used interchangeably, as synonymous, and in the construction of a statute whether this is the case may be judicially determined from the context—from the sense and connection in which it is used. The very authorities which counsel have cited in support of their position, are authorities to this effect. In *Cochran and Sayre v. United States*, 157 U. S. 296, the meaning of the word was determined by a consideration of the plain object of the statute. In *Salem Water Co. v. City of Salem*, *supra*, the inhibition of the statute extended both to "debt and liability." Both words were used, and the court because of this concluded that it was the evident intent of the legislature in thus using both of the words to give to the lan-

guage the broadest and most comprehensive significance possible, and include within the inhibition every character of liability, absolute or contingent, express or implied.

Applying these rules of construction, we feel a clear conviction that this section as applied to contracts of this and similar character in any event does not bear the interpretation placed upon it by either the trial court or counsel. The charter expressly empowered the city to provide for lighting the streets and public grounds.—Art. 2, sec. 20, subdivision 8.

That it would have had such power even without this express grant is probable, but needs no discussion. The legislature made the express grant of power, however, and in a matter of such absolute necessity, essential to the comfort and convenience of the citizens, as well as required for the protection of their lives and property, it is not to be supposed that in a subsequent section of the same act it would insert a provision which would in effect defeat the exercise of the power. As was said by this court in *Gas Company v. Leadville*, 9 Colo. App. 403, in passing upon a similar provision of the general law, regulating all municipal corporations excepting those organized under special charter: "If a prior appropriation was essential to the validity of the contract, then it could not have been executed at all, for the reason that it was impossible to compute the amount which would be due during the twenty-five years, even if it had the power to make such an appropriation for such a length of time, or during any part of said time. It is unreasonable to presume that the legislature required the performance of impossibilities, or that, having once expressly granted to a city the power of making such contracts as that in question, as it did in section 2655, it then in a succeeding section of the same act imposed such restrictions as to

practically nullify such grant of power." In this case as in that, if the theory of appellee be correct, it would have been impossible for the city to have entered into the contract at all, because it was powerless to have made the required appropriation. Under its charter, its appropriations must be made annually, and then only for expenses to be incurred during the current year. It could not make appropriations for such expenses to be incurred during succeeding years. Besides, it would have been impossible to have estimated the exact amount of money to be due in succeeding years. It could not then have been told how many arc lights would be needed for the proper lighting of the city during any of the succeeding years. The result would be that the city could not provide for the lighting of its streets, public grounds and buildings at all, unless it should go to the heavy expense of constructing and maintaining a plant of its own, which the finances of the city might not be in a condition to permit, or unless it submitted to the terms of the one company then in existence. Even if able to have built its own arc lighting plant for street lighting purposes, it would not have secured thereby for its citizens the advantages of a commercial electric light plant or of competition. While it may not be authorized specifically to make any contracts for the lighting of the residences and business houses of the people, we believe that no one would have the temerity to deny that a city in providing for public lighting within the limits and scope of its powers, would be grossly derelict in its duty if it did not use those powers, so far as possible, to advance and subserve the interest, not only of the corporation itself in its corporate capacity, but also of the people of the community in a matter of such paramount necessity as light. It is as we have said a matter of universal knowledge, and a fact of which all courts take judicial

notice in passing upon the contracts of municipalities for light and water, that the erection of a plant for the supply of either involves large expenditure of money, and especially for cities of the size and population of Denver, and that no individual or company would undertake such an enterprise without first having a contract with the city for some term of years, so as to have some reasonable business guarantee that there would be received back from the earnings some proportion of the amount to be expended, thereby reducing the risk of the business venture. The result would therefore be, if the contention of appellee is maintained, that the grant of power to the city for this necessary and beneficial purpose would be practically nullified. It would in effect be saying to the municipal authorities, You may contract for the lighting of the streets, but you may not do that which is absolutely necessary to secure such a contract.

Besides, it is not necessary in order to carry out the evident purpose, intent and object of section ten, to give to it the construction contended for. This purpose was to prevent the squandering of the public money, and to compel municipalities to live within their means, within the limits of a sum fixed beforehand—upon, as it is called, the “pay-as-you-go” plan. Because of this section, they could not after services were rendered, under improper or corrupt influences allow extravagant and unreasonable sums for services rendered or supplies furnished, and they could not thereby exceed the revenues of the city, and create an indebtedness which experience had shown rarely diminished, but usually increased. The same object will be accomplished if it should be held, as we do, that the city was not required to make an appropriation in this instance for any indebtedness which might be incurred during the term of years provided

for in the contract, unless it be for the first year. In other words, if the city during the existence of this contract in each of its annual appropriation bills appropriated a sufficient amount of money to cover its obligations to the light company which may accrue during the year, the object of the statute, and, we believe, its letter, would be complied with.

"The action of municipal corporations is to be held within the limits prescribed by statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction."—*Kyle v. Malin*, 8 Ind. 37, cited with approval in *City of Pueblo v. Robinson*, 12 Colo. 598, and also in *Gas Company v. Leadville*, *supra*.

In *McBean v. City of Fresno*, 112 Calif. 160, the court had under consideration a contract by the city with an individual to take care and dispose of the sewage of the city for a period of five years in consideration of a certain sum per annum, to be paid quarterly. It was claimed that the contract was obnoxious to a provision of the state constitution to the effect that no city should incur indebtedness or liability in any manner or for any purpose exceeding certain limitations. The charter of the city also provided that the trustees should not create, order or permit to accrue any debt or liability in excess of the money in the treasury that might be legally apportioned and appropriated for the purpose. Here both in the constitution and the city charter the words "debt" and "liability" were both used. The contract was held to be valid and effective, the court basing its views "upon the conviction that at the time of entering into the contract no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to

year in separate amounts as the work is performed."

See also *Electric Co. v. City of Dallas*, 23 Texas Civ. App. 323.

We think the same reasoning which supports the conclusion by the courts and the weight of authority which we have discussed in the first part of this opinion that in contracts of this character the word "debt" as used in the constitutional inhibition does not cover the aggregate amount to be paid for the entire term of years during which the contract runs, but only the amount for each annual period, applies with equal force and effect to the construction of this section of the city charter, and supports our conclusion that the word "liability" in the section does not within the intent and meaning of the legislature with reference to contracts of this character and nature, cover the aggregate amount to be paid under this contract for the entire term of years, but only, if the section applies at all, the amount of indebtedness or liability to be incurred during each annual period. The only reasonable conclusion is that, as applicable to contracts of this character, the word "liability" in this section has no broader significance than the word "debt." This construction allows the section to stand and at the same time gives full force and effect to the intent and purpose of the enactment.

3. It is claimed that the city had no authority to contract for any term of years, beyond one, and that ten years is an unreasonable length of time. It is true that the city was not given by its charter power to contract for lighting for any term of years, nor was it restricted or limited to any particular term. In fact, the charter did not specifically give it power to contract at all—to enter into any contract for lighting. The specific grant of power was to provide for lighting. This was the power expressly granted, but under all authorities the city was authorized to exer-

cise those powers necessarily or fairly implied in, or incident to it. As a business proposition, any city, in entering into a contract of this kind, is in the exercise of its business powers. It needs no argument to demonstrate that to carry out such a power it is absolutely necessary that the city should have the power to contract—provide terms and specifications—and this, whether it undertakes to provide for lighting by building a plant of its own or by entering into a contract or agreement with a company or individual to supply the light. There are no specific restrictions upon the right of the municipality to contract in the exercise of this power, and there is no reason in such case why the city in the exercise of its business powers should not have the same right to contract as a natural person. Any other conclusion would be disastrous to the carrying on of the multifarious business affairs of the city, and as we have before said, it is a practical business impossibility for a city to carry out this power unless it does contract for some term of years. It has so far escaped our attention if there is a single case in the books among the vast multitude treating of contracts for lighting cities wherein the contract does not run for some term of years. As to the reasonableness of the term fixed, there being no express limit upon the power of a city as to time, the court should not undertake to interfere with the judgment of the city council, which is conversant with the needs and necessities of the city as well as existing conditions and circumstances to be considered in fixing the term of a contract, unless it is clearly made to appear that there has been an abuse of discretion. There is no showing here to support such a finding. Practically, the only contention is that a ten-year term is too long because it is for ten years. In the general statutes governing all towns and cities of the state excepting Denver, and

possibly one town, the municipalities are authorized to contract for lighting for a term of twenty-five years. If this be a permissible term, we certainly see no reason why ten years would be an unreasonable term for the city of Denver, a municipality existing in the same state, and created by the same legislative power. Our conclusions upon this branch of the subject are amply supported by authority.—*Los Angeles etc. Co. v. Los Angeles*, 88 Fed. 733, Affirmed 177 U. S. 559; *Conery, Jr., et al. v. Water Co.*, 41 La. Ann. 920; *Seward v. Liberty*, *supra*; *Smith v. Dedham*, *supra*; *Water Supply Co. v. Ludington*, *supra*; *State v. Great Falls*, 19 Mont. 518; *L. H. & W. Co. v. Jackson*, 73 Mass. 598.

Irrespective of the question as to the duration of the contract, that it was not only reasonable and highly beneficial in its terms to the city and its inhabitants is indisputable, and clearly appears from the stipulated facts. By it the city secured the public lighting at the same rate it was then paying, being a much less rate than it had paid under contract for years previous, with a still further reduction upon all arc lights in excess of one thousand which the future necessities of the city might require, and also a reduction in rates for light to be used by its inhabitants; also, the benefits of competition between two companies, and also a stipulation by the defendant Lacombe to pay into the city treasury annually in consideration of the privileges granted, three per cent of its gross receipts from commercial lighting, heat and power.

We see no support whatever for the contention that the contract created or tended to create a monopoly. Nowhere in the contract is any exclusive right granted. Manifestly its natural tendency and immediate effect was to prevent a monopoly. In consequence of it a new lighting plant was con-

structed, and thereby both city and citizens were given the advantages of competition.

5. The execution of this and similar contracts is in the exercise by a municipality of its contractual, its private, proprietary or business powers, so to speak, and not of its governmental or delegated legislative powers; hence it is in our opinion not liable to the charge that the execution of the contract would for the term thereof operate as a surrender of the legislative power of the city council.—1 Dillon, *Municipal Corporations*, §§ 27, 66, 68. *Cunningham v. Cleveland*, *supra*; *Illinois etc. Bank v. Arkansas City*, 76 Fed. 282; *Los Angeles etc. Co. v. Los Angeles*, *supra*; *Seitzinger v. Electric Co.*, 187 Pa. St. 542.

In the *Arkansas City* case, *supra*, it was said by the court: "A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked [that the city council can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the unrestricted exercise of their powers as the exigencies of the time might demand]. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way,

and in their exercise it is to be governed by the same rules that govern a private individual or corporation"—citing a large number of cases. We think this concisely and properly states the true rule.

6. It is claimed that the city council had no power to enter into the contract in question, the power to contract for public lighting being by the charter conferred upon, or committed to that branch of the executive department of the city government designated as the department of public works. The duties and powers of the board of public works are set forth in section 35, article 3 of the charter. They may be said to comprehend, generally, the exclusive management and control of the construction, reconstruction and maintenance of all public and local improvements, including the grading, paving, etc., of streets and alleys, of sewers, sidewalks, and, among other things, the "erection of poles, stringing of wires, laying of tracks, pipes and conduits for wires, whether done by the city, corporation or individuals." It is upon these last words that counsel base their contention. We fail to see any support for it. To the board is simply committed the power to regulate the erection of poles and the stringing of wires, because they are necessarily located in the public streets or alleys over which the board has exclusive control. We do not see how the most strained and forced construction could conclude from the language in the charter that the board has anything to do with providing for the lighting. It is true poles must be erected and wires strung before the electric fluid can be transmitted and the light secured, but this is simply an incident to the business—one of the artificial instruments necessary to be used in common with other instruments, like the erection of the building for supplying the necessary machinery, etc. The power to provide for lighting the streets and public

grounds is expressly granted to the city council. In order to accomplish this the party who contracts for the lighting must make certain excavations in the street and erect therein poles and string wires, and before he can do this, the board of public works, because it has exclusive control over the streets, must designate the places where and the manner in which this work can be done so as to restrict the character of the obstruction and the danger to life and property within as small limits as possible; but how this alone can be construed to give the board of public works power to control, manage and contract for the public lighting—a power specially granted to the city council—we utterly fail to conceive. We see nothing in the entire section defining the powers and duties of the board of public works which could in our opinion by any possibility embrace the public lighting.—*Electric Light Co. v. San Bernardino*, 100 Calif. 350; *Trenton v. Shaw*, 49 N. J. Law 638.

However desirable and beneficial may be the lighting of the streets, it does not constitute a public improvement, confided to the care and control of the board of public works.

7. It is suggested, but not very strenuously urged, that the contract was unnecessary and excessive, hence unreasonable, because at the time when it was entered into, another company, The Denver Gas and Electric Company, had then in existence in full operation in the city an electric lighting plant of sufficient capacity to supply the necessities of the city and the needs of its inhabitants; that it was ready and willing to furnish the lighting, and that in fact, before the final passage of the ordinance providing for the contract in question, this company made an offer in writing to supply the public lighting, provided for in the Lacombe contract, for a period of one, three, five, or ten years as the council might elect, for the

price of sixty dollars per year per lamp, being thirty dollars per annum less than that provided for in the contract, and also to so amend its rates for commercial lighting that the average of its charges to private consumers should be less than a certain specified maximum amount, which we will presume was less, although the fact does not clearly appear, than the rate it had charged for commercial lighting theretofore. This offer came too late to be effective for any purpose, either in argument or otherwise. It appears that in March, 1900, nearly a year before the entering into of the specific contract which is here under consideration, the city council and Lacombe entered into a contract precisely similar to, and identical in all its terms and provisions with the one in question in this suit. In pursuance of this, Lacombe commenced work and had expended as appears from the agreed statement of facts a large sum of money to carry out his contract, to wit, the sum of \$300,000.00, and had incurred obligations for \$150,000.00 additional. This contract was attacked by a suit in court at the instance of some taxpayer, and claimed to be invalid because of some irregularity in the publication of the ordinance which authorized it. To avoid any question as to this alleged irregularity, the city council thought best that the ordinance should be reintroduced and re-enacted, and thereby avoid any question as to its validity. This was done in 1901, and it was while this proceeding was pending, and but a few days before the final passage of this second ordinance, that the Denver company made its offer. We think the mere statement of these facts carries with it the conviction that neither in law nor morals was the offer of the Denver company at that late date sufficient to justify the city council in rescinding, even if it had the power to do so. Waiving the question as to whether at the time of this offer

the city was legally bound by the contract with Lacombe, it was unquestionably morally bound and under the highest obligations to carry its negotiations to a final and complete conclusion. Upon the faith of its agreements, Lacombe had incurred an expenditure of nearly half a million dollars. We know of no law, and there is certainly no usage, which would approve, justify or require members of a city council acting in their representative capacity, unless in cases unlike this where they have no discretion, in ignoring and violating the rules of business morality and probity which prevail among individuals, and which the law in every instance seeks to encourage and uphold. It appears in the stipulation of facts that prior to the passage of the ordinance of 1900, the mayor and members of the city council conferred with the manager of the Denver company with reference to a reduction in rates charged the city for electric lighting, and were given to understand that the company was not prepared at that time to make any reduction. It further appears as an admitted fact, that since the commencement of this action, which was begun immediately upon the passage of the ordinance, the Denver company because of, and for the purpose of meeting the competition afforded by the defendant Lacombe, materially reduced its rates for commercial lighting, thereby certainly securing to the inhabitants of the city very material and substantial benefits. This of itself is in our opinion a sufficient answer to the argument that the contract in question was unnecessary.

Counsel on both sides have presented unusually able and exhaustive arguments, and to the proper solution of the questions raised we have given the most careful and thorough investigation. In our opinion the doctrines affirmed by us in *Gas Company v. Leadville*, *supra*, are on principle and in ef-

fect directly applicable to and decisive of the controlling questions in this case, but we have thought proper by reason of the importance of this case to give them further and fuller consideration. We have not considered the objections of appellee *seriatim*, but in the course of this opinion we believe that we have touched and passed upon all. Our conclusion is that although they are pressed with much ingenuity and ability, they are without substantial merit. The contract was in our opinion a valid one, and the court erred in its judgment. This conclusion finally disposes of everything in the case, so that there will be nothing to be done by the trial court in the case, should it be remanded. There is no necessity, therefore, for this useless procedure, and judgment will be entered here in accordance with the views which we have expressed. It will be that the injunction be dissolved, that the defendants go hence without day, and that all costs be taxed against the appellee.

Reversed and Judgment Rendered for Appellants.

On Petition for Rehearing.

WILSON, P. J.

After a careful review of our opinion in connection with the brief of counsel for appellee on petition for rehearing, we discover nothing which raises a doubt in our minds as to the correctness and soundness of the views which we have expressed. We are wholly unable to see the slightest conflict between the doctrines which we have announced, and those laid down in the cases cited.—*Sullivan v. City of Leadville*, 11 Colo. 483; *Smith Canal Co. v. Denver*, 20 Colo. 86.

In the latter case there was no pretense that there had been any prior appropriation covering the expense in controversy for one year, or for any period

of time, or at all. There had not even been a contract between the city and the canal company. Suit was upon an implied contract, recovery being sought upon an implied promise to pay for the water which the city had received and used. In its opinion the court did not pass upon—because it was not involved in the case—the meaning of the word “liability” in the charter section which was there as here under consideration. The case as presented has no similarity whatever to this one. The controlling questions of this was not there involved nor considered.

The Sullivan case involved *inter alia* a provision of the general law with reference to cities and towns somewhat similar to but not precisely like the charter provision here under consideration. The question there was whether there had been any prior appropriation at all to meet the expense incurred under a contract for street improvement—it being conceded that such an appropriation was necessary and required by the statute. The question to be determined was one of fact. If that case is authority at all upon any question involved in this, it is plainly in favor of and supports our conclusion that in this case the appropriation in the general appropriation bill for lighting purposes generally was a sufficient compliance with the requirements of the charter as to a prior appropriation to meet the liability to be incurred under the Lacombe contract for that year. In that case the annual appropriation ordinance seems to have contained an appropriation made generally for “streets, alleys and bridges.” Without any further appropriation, the defendant city had made a contract with the plaintiff for grading and macadamizing certain streets. It was held (p. 488) that the appropriation thus made would have been a sufficient compliance with the law requiring a prior appropriation, provided it had been established that the amount

of such general appropriation was sufficient to cover the expense incurred by the contract.

Counsel express a fear that by reason of certain language used in the opinion, their position upon one question may be misunderstood. We think their apprehensions are groundless, but to obviate all danger of misunderstanding, we will state that counsel for appellee did not at any time contend that the city had power to make an appropriation in any one year, covering the amount to be earned under the contract in subsequent years. This power was expressly denied by them, and indeed the entire want of it was conceded by all parties. The contention of counsel was, and we believe we have so expressed it, that by the contract the city incurred a liability for the entire sum to be earned by it during the ten years, and that the city having no power to make any appropriation except for the amount to be earned during the one year, the entire contract was by reason of this want of power to make a prior appropriation covering the entire liability as they claimed it, void.

The rehearing is denied.

Rehearing denied.

[No. 2667.]

HOVER ET AL. V. THE PEOPLE EX REL. ADAMS ET AL.

1. Cities and Towns—City of Denver—Appropriations—Fire and Police Board.

Under the charter of the city of Denver the city council, in making appropriation for the expenses of the fire and police board, is required to consider and base its appropriation upon the estimate furnished by the fire and police board and not upon an estimate furnished by the mayor.

2. Same—Commissioner of Supplies.

Under the charter of the city of Denver the fire and police board have exclusive authority to expend for and on behalf of the city, all funds set apart in the annual appropriation ordinances for the use of the board, and a provision in the appro-

appropriation ordinance that an appropriation to purchase a fire engine, hose etc., should be expended by the commissioner of supplies, is absolutely void and the board would have the right to direct the expenditure of the fund, notwithstanding such provision.

3. Same—License Inspectors—Mandamus.

The city council of the city of Denver will not be compelled by mandamus to make an appropriation to pay the salaries of license inspectors in accordance with an estimate furnished by the fire and police board where such inspectors are not provided for in the charter and nothing appears in the alternative writ to indicate what such inspectors are or how the office was or would be created, or how the inspectors were or would be appointed.

4. City of Denver—Appropriations—Fire and Police Board—Mandamus.

The charter of the city of Denver providing that the fire and police board shall present to the city council a detailed statement of the money necessary to defray the expenses of that department for the succeeding year and that the city council shall provide for the appropriation of money sufficient to defray such expenses, using the estimates of the board as a basis for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit, does not require the city council to appropriate the exact sums named in the statement of the fire and police board. If the city council should fail to make any appropriation for the use of the fire and police board it may be compelled to do so by mandamus, but it cannot be compelled by mandamus to appropriate the sums named in the statement of the fire and police board.

5. Practice—Mandamus—Demurrer.

A demurrer to the answer in mandamus proceedings relates back to the alternative writ, and if that writ is insufficient it should be so adjudged.

Appeal from the District Court of Arapahoe County.

Mr. HARPER M. ORAHOOD, Mr. HALSTED L. RITTER and Mr. CALVIN P. BUTLER, for appellants.

Mr. MILTON SMITH, Mr. JOHN T. BOTTOM and Messrs. PATTERSON, RICHARDSON & HAWKINS, for appellees.

THOMSON, J.

Proceeding in mandamus to compel the city council of the city of Denver to pass, and the mayor to approve, an ordinance appropriating certain specified sums of money to defray the expenses of the fire and police board during the year 1902.

The averments of the petition, recited in the alternative writ, were that on the 29th day of November, 1901, the board presented to the mayor a detailed statement of the moneys necessary to defray its expenses during the year 1902, from which it appeared that the following sums were required: For the maintenance of the fire department, \$225,511; for the maintenance of the police department, \$244,403.68, and for the maintenance of the bureau of excise, \$4,800; that this statement was thereupon transmitted by the mayor to the city council; that the mayor in making his recommendations for the annual appropriation ordinance for the year 1902, disregarded the statement of the fire and police board, and recommended for the fire department an appropriation of only \$160,000, and for the police department an appropriation of only \$150,000, and recommended no appropriation for the bureau of excise; that the total revenue of the city for the year 1902 from the tax levied for general purposes, and from licenses and other sources, was estimated at the sum of \$966,406; that the board of aldermen, on the 10th day of January, 1902, passed a bill for an ordinance making appropriations for the support and maintenance of the several departments for the year 1902, in which an insufficient amount was set aside for the fire and police board; that the board of supervisors threaten to pass, and the mayor to sign, the same bill; that the amounts asked by the board are necessary for the maintenance of the several departments under its control; that the bill as passed by the board of alder-

men makes unnecessarily large appropriations for the maintenance of other departments, thus absorbing revenue which would otherwise be available to the board; and that a sufficient appropriation for the necessities of the board cannot be had, unless it be compelled by a writ of mandamus. The alternative writ commanded the board of aldermen and the board of supervisors, together constituting the city council, to pass, and the mayor to sign, an ordinance appropriating to the fire department for its maintenance during 1902 \$225,000, to the police department \$224,000, and to the bureau of excise \$4,800; or, on a day specified in the writ, to show cause why they should not be required so to do.

The respondents demurred to the alternative writ for insufficiency. Their demurrer was overruled, and they answered denying that the amount demanded by the board was necessary for the maintenance of its bureaus, or that the public interest required the appropriation asked, or that the other appropriations were excessive. The answer also set forth in full the statement presented on the 14th day of December, 1901, by the mayor to the city council, of the amounts necessary to defray the expenses of the city government for the ensuing year, and the bill for the annual appropriation ordinance passed by the board of aldermen in pursuance of the mayor's statement. In the statement of the mayor shown by the answer, he recommended an appropriation of \$160,000 to the fire department, but modified the recommendation by a request that out of the amount there should be expended the sum of \$20,000 for a fire engine and hose, and for other purposes. The bill as passed by the aldermen provided for an appropriation to the police department of \$150,000—the sum named by the mayor. The following is the provision of the bill in relation to the fire department:

“There is hereby appropriated to the fire and police board for the use of the fire department of the city of Denver the sum of one hundred and forty-seven thousand dollars (\$147,000) for the payment of salaries, rentals, electric lights, gas, repairs on fire apparatus, and all other expenses incidental to the operation and maintenance of said fire department. There is further appropriated the following sums of money to be expended by the commissioner of supplies for the use of the fire department: The sum of five thousand five hundred dollars (\$5,500) for the purchase and installation into service of a No. 1 Metropolitan fire engine; four thousand dollars (\$4,000) for the purchase of five thousand feet of standard hose; and three thousand five hundred dollars (\$3,500) for necessary repairs on the several hose houses.”

A demurrer to the answer was sustained, and the alternative writ made peremptory.

The fire and police board of the city of Denver was established by an act of the legislature, approved March 4, 1891, entitled “An act to repeal articles 7 and 8 of ‘An act to reduce the law incorporating the city of Denver and the several acts amendatory thereof into one act, and to amend and revise the same,’ approved March 16, 1885, and to enact articles in lieu thereof.”—Session Laws 1891, p. 65.

The articles which were repealed related to the police department and the fire department. Article 7 provided for a police department, composed of a chief of police, to be appointed by the mayor with the consent of a majority of the members elect of the board of supervisors, together with such policemen as might be appointed by the mayor without confirmation; and a board of police, consisting of a mayor, the president of the board of supervisors, the president of the board of aldermen, and one other super-

visor, and one other alderman, to be appointed by the mayor. Article 8 provided for a fire department, consisting of a chief engineer, an assistant chief engineer and a fire warden, to be appointed by the mayor, with the consent of a majority of the members elect of the board of supervisors, and of the members of the several fire companies to be appointed by the mayor, and, at his discretion, discharged.—Session Laws 1885, pp. 107, 110.

The enactment which took the place of the repealed articles, provided for the appointment by the governor of the state, with the advice and consent of the senate, of three persons, who should constitute the fire and police board, and vested in the board so constituted all powers and duties connected with the appointment, removal, government and discipline of the officers and members of the fire and police departments, and the fixing of their salaries, under rules and regulations to be adopted by the board. It also contained the following provision:

“During the last quarter of the calendar year, the said fire and police board shall present to the city council of the city of Denver, a detailed statement of the money necessary to defray the expenses of the fire, police and detective departments of the city for the succeeding year, together with a statement of the probable expenses to be incurred by said board; and in the annual appropriation ordinance for the next calendar year, the city council shall provide for the appropriation of sums of money sufficient to defray the expenses incident to said departments and to be incurred by said board.”—Session Laws 1891, pp. 65, 68.

This provision was subsequently amended by adding the words, “using such estimates as a basis

for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit."—Session Laws 1891, p. 74.

On April 3, 1893, an act was approved entitled "An act to revise and amend the charter of the city of Denver."—Session Laws 1893, p. 131.

By that act, previous legislation, unchanged, or with altered phraseology, and new provisions, were consolidated into the present charter of the city. The constitution of the fire and police board is provided for in section 44 of article 3 of this charter, as follows:

"The department of public health and safety shall include the following officers, who shall respectively be the heads, and have active charge of the affairs, of the following bureaus, to wit: A fire commissioner, of the bureau of fire. A police commissioner, of the bureau of police. An excise commissioner, of the bureau of excise. A health commissioner, of the bureau of health. A commissioner of inspection, of the bureau of inspection. The fire commissioner, police commissioner and excise commissioner shall constitute the fire and police board of the city of Denver, and all the operations of the bureaus of fire, police and excise, shall be subject to the general control of said board."

The section following, in so far as it provides for the manner of appointment of the members of the board, is taken from section 1 of the act of March 4, 1891, establishing the board. The provision of the latter act concerning appropriations for the expenses of the fire and police board, and the subsequently added words, appear in section 53 of article 3 of the charter in the following form:

"During the last quarter of each calendar year, said board shall present to the mayor of the city of Denver, a detailed statement of the moneys necessary

to defray the expenses of said board during the succeeding year, with a statement of the probable expenses to be incurred by said board; and in the annual appropriation ordinance for the next calendar year, the city council shall provide for the appropriation of sufficient moneys to defray the expenses incident to and to be incurred by said board in the exercise of the powers hereinabove granted, using such estimates as a basis for such appropriation, and conforming thereto as nearly as the city's finances will permit."

The general annual appropriation is provided for in section 6, article 6, as follows:

"During the last quarter of each calendar year, the mayor shall present to the city council a detailed statement of the moneys necessary to defray the expenses of the city government for the next year, and for this purpose shall require from the heads of the various departments of the city government detailed statements of the probable expenses to be incurred in their several departments. As soon thereafter as possible, the city council shall pass an annual appropriation ordinance for the next calendar year, providing for the appropriation of certain definite sums of money to defray the expenses incident to each department of the city government, based upon the estimate of the mayor, but not of necessity governed by it. The total amount appropriated by such ordinance shall in no case exceed the probable amount of money that will be received during the year by taxation and from other sources of revenue."—Session Laws 1893, p. 197.

By section 20 of article 2, the management and control of the city's finances, and all property of the corporation, is confided to the city council, except as otherwise provided in the act; and the council is empowered to provide for the purchase of steam fire

engines and other apparatus for the extinguishment of fires.—Session Laws 1893, pp. 144, 149.

Sections 47 and 48 of article 3 confer upon the fire and police board “full, complete and exclusive power and authority on behalf of the city to perform all executive functions of the city in the organization, management and control of the fire and police departments of the city”; and, in the exercise of the powers conferred by the act, “full, complete and exclusive authority to expend, for and on behalf of the city, all funds set apart in the annual appropriation ordinance for the use of said board.”—Session Laws 1893, pp. 173, 175.

Some incidental subjects of dispute between counsel will be disposed of before a consideration is entered upon of the principal question in the case. In behalf of the mayor and council it is urged that as the fire and police board is required by the terms of section 53 of article 3 to present its statement of the moneys it deems necessary, to the mayor, and as section 6 of article 6 provides that the mayor shall present to the city council a detailed statement of the moneys necessary to defray the expenses of the city government for the next year, and shall require from the heads of the various departments of the city government the information necessary to his statement; and as the latter section further provides that the appropriation ordinance following the mayor’s statement, shall be based upon it, but not necessarily governed by it; the estimates for the fire and police departments which are laid before the council, are the mayor’s estimates, and the council is clothed with the same discretionary authority to say what the appropriation for the board shall be, that it possesses in respect to the other departments, and that such discretion is beyond the control of the courts.

The portion of section 6, of article 6, which I

have quoted, was taken from the act of April 2, 1885, and was section 6 of article 6 of that act. By articles 7 and 8 of the same act, the officers of the fire and police departments received their appointments from the mayor. He was chairman of the board of police, he appointed the policemen, and he appointed, and, at his discretion, discharged the members of the fire companies. The same relations existed between him and all the departments of the city government, and he had the same right to require statements of probable expense from one department as from another. But in 1891, his relations with the fire and police departments were dissolved. The fire and police board then established, while it is one of the agencies for the accomplishment of the purposes for which the municipality was organized, and is a part of the city government, is independent of the mayor. It is its estimates, and not the mayor's statement, that the council must use as a basis for the appropriation made to defray its expenses. The fire and police departments, for whose expenses he was required to present estimates by the act of 1885, ceased to exist; and he is not authorized to speak for the fire and police board. The law requiring estimates from him is still in force, but the fire and police board was never within its operation.

However, in opposition to this view, it is said that when the provision of the original act establishing the fire and police board that its estimates should be presented directly to the city council, was so changed as to require their presentation to the mayor, that board was placed upon an equality with the other departments, and required like them to furnish a report to the mayor, to be incorporated by him into his own detailed estimate; and it is argued that the very fact of the change indicates that such was the legislative intent. But the particulars in which the

later law differs from the former, and upon which counsel venture no comment, vitiate the reasoning and invalidate the conclusion. As no estimate of the board's expenses except its own can be considered by the council, and as the appropriation can be based on no estimate except the one furnished by it, it seems evident to me that the legislature regarded the presentation of the board's statement to the mayor merely as a more convenient method of bringing it to the attention of the council, and that the mayor's duty is simply to transmit it to that body without expression of his own views. The incorporation into his statement of a recommendation respecting the appropriation to be made for the board, is absolutely purposeless. It imparts no symmetry to the document, and is without practical utility.

The bill passed by the aldermen, and now resting with the supervisors, appropriated \$13,000 for the use of the fire department to be devoted to the purchase of a fire engine and a quantity of hose, and to repairs on hose houses, the money to be expended by the "commissioner of supplies." The appropriation of \$13,000 for the use of the fire department would be valid, and would give the fire and police board the right to the money; but a provision that the money should be expended by the "commissioner of supplies" or by any other agency than the board itself, would be absolutely void. The law gives the board general control of all the operations of the bureaus of fire, police and excise; and full, complete and exclusive power in behalf of the city to perform all executive functions of the city in the organization, management and control of the fire and police departments; and the full, complete and exclusive authority to expend for and on behalf of the city, all funds set apart in the annual appropriation ordinances for the use of the board. The powers granted

to the board are expressed in absolute terms. The language employed renders doubt as to the intention of the legislature impossible. The bill sets apart \$13,000 for the use of the board, but provides for its expenditure through another agency. This provision for the expenditure of the money is in direct contravention of the law. In the operation of its bureaus, the performance of its executive functions, the control of the fire and police departments and the expenditure of all funds set apart for its use by the annual appropriation ordinance, its authority is full, complete and exclusive, and the city council is absolutely powerless to take from it a single one of its prerogatives.

But certain other charter provisions are mentioned by which it is said the grants of authority to the board are qualified. Among the powers granted to the city council is one "to provide for the purchase of steam fire engines and other apparatus suitable for extinguishing fires." In the charter of 1885, of which the present one is the successor, the language was, "to procure steam fire engines and other apparatus suitable for extinguishing fires."—Session Laws 1885, page 84. By this provision the council was authorized to act directly in the purchase of the engines and apparatus. But when the fire and police board was established and its powers defined, the language was changed, and the authority of the council limited to making provision for the purchase, the expenditure of the money provided, being confided to the board. Section 50 of article 3 of the present charter provides that immediately upon the appointment of the board all engines, horses and other property pertaining to the fire and police service shall be turned over to the board, and such property together with all appliances thereafter purchased or acquired *by or for the city* shall be under the

control and management of the board. In the words "purchased or acquired by or for the city," counsel find an implication that the power of the fire and police board to make the purchases and expend the money is not exclusive—that it is shared with the city itself. I do not think those words are even suggestive of difficulty. The corporation operates only through its officers and agents. An act done by its agent or officer properly authorized, is an act done by and for it. The fire and police board is one of the agencies through which the city acts. Whatever is lawfully done by that board is done in behalf of the city; and any purchase or expenditure made by it in pursuance of the authority with which the law has clothed it is a purchase or expenditure by and for the city.

By section 94 of article 3 it is provided that the superintendent of supplies—not "commissioner of supplies"—shall, for and in behalf of the city, purchase all furniture, books, stationery, tools, materials and supplies, and all things whatsoever necessary for the use of the several departments, officers and employees of the city. The foregoing would hardly give the superintendent of supplies any authority in the way of expending money appropriated to the fire and police board for the purchase of an engine and hose, and the repairs of hose houses. The enumerated items could scarcely be said to include fire appliances and apparatus, or the repair of hose houses. And the words, "and all things whatsoever necessary for the use of the departments, offices and employees of the city" add nothing to the scope of the preceding language. They are *ejusdem generis*, and embrace only articles of the same kind with those enumerated.—*St. Louis v. Laughlin*, 49 Mo. 559; *Morse v. Morrison*, 16 Colo. App. 449, 66 Pac. 169. But aside from all this for the reasons that the authority of the board

as to the expenditure of money appropriated to its own use is exclusive, the provisions respecting the superintendent of supplies has no application to it. By express law that officer is debarred from handling its money. When the appropriation for the use of the board is made, no limitation by the council upon the authority of the board in relation to the expenditure of the fund is of any effect.

The bill adopted by the aldermen appropriates nothing for the maintenance of the bureau of excise. If an appropriation to that bureau is required by law, the council has no discretion to refuse it. Whatever right it may have to determine the amount, an appropriation must be made. It is contended, however, that the appropriation for this bureau asked by the fire and police board, is not required by law. In the detailed statement presented to the mayor by the board, the following was the estimate for the bureau of excise:

“Four license inspectors, \$100.00 per month.”

The charter makes no provision for license inspectors. Whether these particular inspectors are already in office, or are yet to be appointed, or what duties, when appointed, they are supposed to perform, we are not advised. By section 77 of article 3, the fire and police board is given exclusive authority to grant, refuse and revoke licenses for certain occupations, including the selling and giving away of intoxicating or malt liquors. By section 19 of the same article application for license is made to the board, the applicant deposits the necessary money with the treasurer, the board passes upon his application, and, if it be granted, the treasurer issues the license. Section 78 authorizes the revocation of a license by the board after a hearing upon a complaint signed by three reputable citizens of the proper election precinct, charging the holder of the license with the vio-

lation of some statute or ordinance. The foregoing is the entire statute law relating to the bureau of excise; and I am unable to see in what duty assigned to that bureau the assistance of license inspectors is required. But if they are required, provision is made for their appointment. By the terms of section 4, article 3, the board may, with the approval of the mayor, adopt rules for the appointment, conduct, discipline, compensation and removal of its own subordinates and employees; and may appoint and remove all such clerks, assistants and other officers, subordinates and employees as may be necessary in the exercise of its powers, and the performance of its duties. Of course the appointment or removal must be in accordance with the rules adopted with the consent of the mayor. The license inspectors for whose salaries an appropriation was asked are not statutory officers. Unless created by some agency empowered for the purpose by the charter, there is no such office; and if so created, not being statutory, courts cannot take judicial knowledge of its existence. I find nothing in the alternative writ to indicate what these license inspectors are, or what it is proposed they shall be; how the office was created, or if not created, how it is intended it shall be created, or in what manner the inspectors have been, or are to be appointed. Without information of any kind on the subject, no court can say that it is the duty of the council to appropriate money for the payment of the supposed inspectors' salaries. The case of *Morgan v. Denver*, 14 Colo. App. 147, referred to on both sides, is not in point. The license inspector whose claim was adjudicated in that case, was appointed pursuant to an ordinance creating the office, and defining the duties of the inspector. This court held that in virtue of the various services required of him by that ordinance, he assisted the treasurer, the fire and police board and the department of

law, but was not in the special employ of any one of them.

The questions I have been considering are the subject of considerable argument by counsel; and their solution appears to be regarded as having a relation of some kind to the real subject of the controversy. But while, in its details, the proposed ordinance should conform to the law, a decision that it ought to embrace certain matters and exclude certain other matters, can have no decisive influence upon the main question in the case. Is it a duty of the city council, the performance of which can be compelled by writ of mandamus, to appropriate for the use of the fire and police board, the exact sums named in the statement of the board to the mayor? Not one of the powers granted to the board respecting its control of the fire and police departments, its performance of executive functions, and the expenditure of its funds, full, complete and exclusive as the grant is, authorizes it to dictate the amount of the appropriation to be made for its use by the city council. None of the subjects upon which those powers are to be exercised has any relation to the enactment of an appropriation ordinance. Whatever authority the board has in the matter of the appropriation is to be found in section 53 of article 3 of the charter. I have already given a history of the legislation of which that section is the final outcome. As it was originally enacted, it may have contemplated an appropriation by the council of the full amount of the board's estimates. The board presented a statement of the amount necessary to defray its expenses, and a statement of the probable expenses to be incurred, to the city council. It was then the duty of the council, in the annual appropriation ordinance, to provide for the appropriation of sufficient money to defray the expenses incident to, and to be incurred by the board. I do not undertake to con-

strue the language, and it is not necessary that I should. Whatever the intention of the legislature may have been, the section was afterwards amended. The substitution of the mayor for the council for the purpose of receiving the statement is without significance. But the section was further amended by adding words requiring the city council to use the estimates as a basis for the appropriation and conform to them as nearly as the city's finances would permit. It is upon the section as thus amended that the decision of the question now under consideration must turn.

Mandamus lies to compel the performance of a duty purely ministerial in its nature, involving no discretionary right, and not requiring the exercise of judgment; but it does not lie where the performance of the duty is discretionary, or necessitates the exercise of judgment.—High on Extraordinary Remedies, § 24. This principle is fundamental, and I do not understand that it is disputed here. The words added to the original section contemplate a possible condition of the city's finances which would render an appropriation to the fire and police board, of the full amount of its estimates, impracticable, or, at least, unadvisable. The estimated income may not be sufficient to give to each of the several departments of the city government all that it requires; and no appropriation beyond the estimated income can be made. For 1902 the income was estimated at \$966,406, and the bill passed by the aldermen appropriated all of it. The amount falls considerably short of the aggregate demands of the different departments, and must be apportioned among them fairly. To use the estimates of the fire and police board as a basis and conform to them as nearly as the city's finances will permit, is simply to give the board such portion of the entire appropriation as would be its share upon a proper

distribution of the insufficient fund among all of the departments.

The charter does not direct the appropriation to the fire and police board of any certain sum. Where the estimated income is insufficient to satisfy all, it requires the appropriation to the board of a sum which, the relative importance of all the departments being duly considered, shall be its just proportion of the whole; and to fairly apportion the fund among the departments so that the appropriation to the board shall conform to its estimates as nearly as the city's finances will permit, demands the exercise of sound and discriminating judgment.

The charter imposes upon the council the duty to enact the annual appropriation ordinance, and performance of that duty may be compelled by mandamus. But where the income is insufficient to satisfy the demands of all the departments, compliance with the law requiring as close a conformity to the estimates of the fire and police board as the condition of the finances will permit, renders the duty to be performed *quasi* judicial in character; and whatever remedy the board may have if, in the appropriation ordinance to be adopted, it fail to receive what it regards as its just proportion of the revenue, that remedy is not mandamus.—*United States v. Seaman*, 17 How. 225; *United States v. Commissioners*, 5 Wall. 563; *Ditch Co. v. Maxwell*, 4 Colo. App. 477.

The demurrer to the alternative writ should have been sustained; but the court, having overruled it, should have carried the demurrer to the answer back to the writ, and adjudged it insufficient.

The judgment is reversed, with instruction to dismiss the proceeding.

Reversed.

GUNTER, J., concurs.

WILSON, P. J., dissenting.

With great respect for the opinions of my associates, my judgment yet compels me to disagree with their views and dissent from their conclusion upon the main question in this case.

It is a fundamental and controlling rule, recognized by all authorities and having no exception, that in construing doubtful statutes it is the first and paramount duty of courts to ascertain the intent and object of the legislature in its enactment, and to give effect to such intent when so ascertained. It is the intention of the lawmakers that is to be enforced; their intent is the law.—*Rogers v. People*, 9 Colo. 455; *Edwards v. Railroad Co.*, 13 Colo. 59; *County Com'rs v. Hall*, 9 Colo. App. 538; Sutherland on Statutory Construction, § 234; *et seq.*; Endlich on Interpretation of Statutes, § 25, *et seq.* It is also an equally well-settled rule that a statute should be construed as a whole, the general intent being kept in view in determining the scope and meaning of any part. Apparently inconsistent expressions are to be harmonized to reach this general intent. In arriving at the meaning of any one section the entire statute must be considered. If different portions would seem to be conflicting, that construction is to be given which would harmonize them. If a section standing alone admits of two constructions, one of which would harmonize with the entire act and carry out the general intent, and the other would create discord, the former construction should be adopted.—*Livestock Co. v. Godding*, 20 Colo. 71; *Lamborn v. Bell*, 18 Colo. 346; Sutherland, *supra*, § 241; Kent's Commentaries, § 461. In the last cited authority the rule is thus broadly stated by Chancellor Kent:

“In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over

the strict letter." By Mr. Sutherland it is said in the section cited, after a consideration of all authorities and the almost countless adjudications upon the rule: "If upon examination the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. * * * The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute, and if the words are sufficiently flexible to admit of some construction by which that intention can be better effected, the law requires that construction to be adopted."

These rules spring from necessity, one of the principal reasons of them being as stated by a very good authority, that there is "no word in the English language which does not admit of various interpretations." Because of this it has also been well said by another distinguished lawyer and judge that there is nothing so difficult as to construct properly an act of the legislature—a statute—and nothing so easy as to pull it to pieces.

The authorities even go to the extent that words may be entirely rejected as surplusage when a statute would otherwise fail of its object—fail to effect the purpose of the legislative intent, if such intent can be reasonably inferred.—*Simmons v. Powder Works*, 7 Colo. 289; *Edwards v. Railroad Co.*, *supra*; *U. S. v. Stern*, 5 Blatchford 514.

Prior to 1891 the police department of the city of Denver was under the absolute control and management of the city council, its nominal head being a board consisting of the mayor, the president of each of the two houses of the council and two other members of the city council appointed by the mayor. The legislature of that year made a radical change

whereby the department, as well as the fire department, was placed under the absolute control, charge and management of a board consisting of three members, who were to be appointed by the governor of the state. There can be no two opinions about the intent and object of this statute. It was intended to take from the city council and all of its members, and from the mayor, all power to control and manage these two departments, or to participate in such control or management. It was intended to invest this power in a board which was entirely independent of the city council. This intent clearly appears from the act itself, especially when considered in connection with the statutes theretofore in force, regulating and providing for the control. If further proof were needed, it would be abundantly furnished by a consideration of the current history of public affairs bearing upon the municipal government of Denver, concurrent with and for several years antecedent to this enactment, a consideration which is within the province of the courts and which, indeed, is frequently one of the most effective methods resorted to in order to throw light upon the legislative intent. It is this which most clearly shows the abuse or evil which the legislature intended to reach and to correct.—*City of Dawson v. Waterworks Co.*, 106 Ga. 704; Endlich, *supra*, § 29. In the last cited authority it is said, in announcing the rule as laid down and recognized by the supreme court of the United States, by the courts of England and the highest courts in the states: "He must refer to the history of the times to ascertain the reason for and the meaning of the provisions of a statute, and to the general state of opinion, public, judicial and legislative, at the time of the enactment. And the unmistakable evidence of such contemporaneous circumstances of the intention of the legislature should govern the construction of the statute whose terms are

left doubtful by the language and whose object is the correction of an abuse.”

It is not necessary for the purposes of this opinion to set forth to any extent the unsavory details of the history to which we have referred as bringing about this enactment. It is sufficient to say that the newspapers of the time teemed with charges of the grossest and most venal corruption in the conduct and management, especially of the police department. It was openly claimed both in the public prints and in public meetings of citizens,—to such an extent, too, that the charges were reiterated and given prominence in the press throughout the state generally,—that the police force of the city under the corrupt system of management then and theretofore prevailing instead of affording protection to the people, was notoriously engaged in defying and defeating the will of the people; that it connived at the lawless intimidation of voters, the stuffing of ballot-boxes, and in fact, the stealing of ballot-boxes; and indeed, it was openly charged that members of the force themselves engaged in these criminal proceedings. It was further charged that bribery was rampant, and that instead of suppressing criminality, some members of the department were in league with the criminal classes, by extending to them protection and freedom from arrest or prosecution. It was indeed charged that the whole city government had become honey-combed with corruption, and that for the purpose of carrying out the nefarious schemes of the cliques and combinations which seemed to control the municipal legislative bodies, the fire and police department was the chief instrument, and that by reason of these alleged facts, this department had become wholly inefficient and incapable of discharging the responsible duties imposed upon it. Whether these charges were true or false, it is unnecessary for the purposes of

this opinion to inquire. It is a matter of judicial history that some of them were preferred and investigated in the courts, with what result it is not here necessary to say. By these reports the people of the city became thoroughly aroused, and there arose a public and pressing demand for relief,—in fact, for the particular relief which was granted by the act of 1891, namely, the divorcement of the fire and police department from the other departments of the city government, and the taking of its control wholly and absolutely from the municipal authorities. It was under these circumstances, influences and surroundings that the eighth general assembly at an early period of its session, passed the act to which we have referred, and passed it by a unanimous vote of both the senate and house of representatives, and with the emergency clause so that it could go into immediate effect. In connection with these circumstances it may and must also be considered that in all cities one of, if not the most important departments of the municipal government is that of the fire and police. Upon it citizens must depend for protection for their lives, persons and property, to secure which is the chief object of municipal organization and government. It must be remembered, too, that Denver was then, as it is now, the largest city in the state, containing more than one-fourth of the population of the entire state, and as large, if not possibly a larger proportion of the entire wealth. There it was especially necessary to have an honest and efficient administration of police affairs, because where are concentrated population and wealth, there flock the criminal classes,—where the prey is, come the vultures,—there they find the green pastures in which to luxuriate and fatten. There is not and cannot be any room for ques-

tion in my opinion as to what the intent of the legislature was by its enactment in 1891, and that it was such as I have stated.

By the act of 1891, approved March 4, it was provided that the fire and police board shall, "during the last quarter of the calendar year present to the city council of the city of Denver a detailed statement of the money necessary to defray the expenses of the fire, police and detective departments of the city for the succeeding year, together with a statement of the probable expenses to be incurred by said board; and in the annual appropriation ordinance for the next calendar year, the city council shall provide for the appropriation of sums of money sufficient to defray the expenses incident to said departments and to be incurred by said board." Subsequently, and during the same session of the legislature, this section was amended, and a lengthy section adopted in lieu of it, providing how money should be paid out, how pay-rolls certified, regulating the issuance of warrants, etc., and concerning other matters not embraced in the original section. In the case of the re-enactment of that portion of the section to which we have referred, it was provided as in the old section and in the same language, that the board should present a detailed statement of the money necessary to defray expenses, etc., for the succeeding year, and that the city council should provide for the appropriation of the sums of money sufficient to defray the expenses incident to and to be incurred by said board, but there were added the words "using such estimates as a basis for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit." Here arises the trouble and the occasion of this suit. I cannot give to these words the construction contended for by the attorneys on behalf of the city, and favored by my breth-

ren of this court. To so hold would in my opinion utterly subvert, nullify and defeat the entire object and intent of the legislature. The fire and police department could not of course be conducted without the expenditure of large sums of money to be derived from taxation. It needs no argument to convince any reasonable person that if the purse-strings were to be placed in control of the city council, that if the unrestricted power to fix the amount of money to be used by the fire and police departments, to say whether it should be large or small, should be vested in that body, from whose corrupt control and management the legislature was seeking to wrest the fire and police board, then the whole purpose of the act would be defeated. The board instead of being wholly independent of, would be absolutely dependent upon the city council. In such case it is too patent to require argument that there would be placed in the hands of the council a powerful weapon by the skillful use of which it could coerce and control the board. It could dictate the number and personnel of the force and the action of the board, or in case of refusal leave them without adequate funds to discharge the duties imposed for the public protection. In either case the main and only object of the statute would be nullified. Such a construction would obviously lead to an absurdity, and would be plainly and utterly inconsistent with the manifest and paramount legislative intent. In such case it is the duty of the court under the undisputed rule which I have cited, to consider the act as a whole, and endeavor to harmonize all of its provisions with the intent, and give to these words a construction, if possible, in harmony with the remainder of the statute. In my opinion, the fire and police board, and it only, is clearly vested with the power to determine what would be necessary and sufficient to defray its expenses for the

current year, and the words with reference to the appropriation by the city council, "and conforming thereto as nearly as the condition of the city finances will permit," do not divest the board of this power. These words, if they mean anything in a restrictive or supervisory sense, simply authorize the city council to change this estimate only in case it appeared that the amount of the estimate, added to the salaries of officers and other specific charges fixed by the statute and required to be paid, should exceed the probable amount of revenue to be collected through the year. This is concededly not the case here. In other words, to make it plainer, my opinion is that it would be the duty of the city council in making its annual appropriation bill, to first ascertain the amount of the salaries of officers, and other fixed charges specifically required by the statute to be paid, and then to add to that the estimate or requisition of the fire and police board; and if the total did not exceed the total probable amount of revenue, it would be its duty to make the appropriation for the board in the precise sum stated in its estimate. This construction would give effect to every part and portion of the statute and would harmonize with its unquestioned intent and object, whilst the other construction would defeat it. If I am correct in this conclusion, it will of course be manifest that the city council had only a fixed and definite duty to perform, and that hence mandamus would lie.

There is nothing unreasonable in investing the fire and police board with the exclusive and sole power to say what sum of money should be required for the proper exercise of its duties. All municipal power is derived solely from the legislature, and a municipality can exercise no power except that expressly granted or necessarily implied. The legislature if it desired, and it frequently does, could con-

fer upon any department of the municipal government—indeed, upon any official—any special privileges or powers which it might see fit, or impose upon it specific duties and responsibilities which the general legislative body of the municipality could in no respect change. Why should it be more improper for the board than for the city council to say what amount of money they must have for the duties imposed upon them? The board has sole charge of the dispensing of the money, and by reason of its having exclusive control of the department, it has a knowledge of its needs and necessities which the city council does not and cannot from the very nature of the thing, have. It is said, however, that if the board was invested with this absolute power, it might fix such a large sum that there would be nothing left for other departments of the city. This is possible. It may be said also that if the city council has the power contended for by appellants, it might appropriate for the use of the department a sum so manifestly insufficient and inadequate that it would be impossible to render the services required by statute and the people would be denied that protection which they are entitled to have. Power in either case might be abused, but for an unwarranted and arbitrary abuse I imagine that in either case the same remedy would lie,—namely, an appeal to the courts.

My conclusion as to the construction of the disputed section is in my opinion strongly supported by two recent decisions of this court.—*Board of Public Works v. Hayden*, 13 Colo. App. 36; *McMurray v. Hayden*, 13 Colo. App. 53. The latter case came up on the question of the refusal of the mayor to approve an estimate of the board of public works for some street improvements. The charter provided that payments for such improvements should be made in bonds or warrants, as the case might be, issued by

the city treasurer upon estimates and orders of the board of public works, approved by the mayor. The bonds could not issue until the estimate of the board had received such approval. The court held, and rightly, too, in my opinion, that this power of approval vested in the mayor was not discretionary, that it was purely ministerial and that the charter made it mandatory upon him when the estimate of the board was presented. This conclusion was based upon the fact only that the board of public works is vested with exclusive authority in all matters connected with improvements. They furnish the specifications for the work, direct it while in progress, and that it is their duty to see that it is done in accordance with the specifications; that they receive no advice from the mayor, and nothing is left to his judgment; that they constitute the sole tribunal to pass upon the question of the fulfillment by the contractor of his undertaking, and that the estimate which they issue is their judgment that the work has been properly performed, and that a certain amount is due; and so far as the mayor is concerned, that judgment is final. I cannot conceive why these reasons are not equally applicable to the present case. The fire and police board, equally with the board of public works, has supreme power within the scope of its duty as defined by the charter, and neither the mayor nor the city council has any discretion in reference to it. To approve in its ordinary acceptation as used in reference to the acts of public officers, means, and it is so defined by Webster, to sanction officially, to ratify, to confirm. Where this power is vested in an officer there is necessarily implied according to the general understanding and usage of the word, the exercise of judgment and discretion and the power to withhold approval and to disapprove. To approve one must or at least should, believe the thing to be right and

proper. Anderson in his Law Dictionary gives as definitions, to accept as good or sufficient for the purpose intended, to affirm as lawful and proper, to concur in the propriety or expediency, the legality or constitutionality of, to give executive sanction to, etc. By no authority within my knowledge is it defined so as to exclude in the exercise of the power, the right of the person to whom the matter is submitted for approval, to use judgment and discretion and to disapprove if desired. In that case we held, and properly too, that the word "approval" did not mean approval at all; that practically and in effect as there used it meant only signature or endorsement. And why? Because "the board of public works is vested with exclusive authority in all matters connected with the improvements." To have held otherwise would have resulted in giving the mayor the power to have participated in or influenced this control and management thereby tending to defeat the express object, purpose and intent of the statute—that same statute which aimed to give to the fire and police board the exclusive control and management of all matters pertaining to the fire and police departments. To uphold the act and carry out the purpose of its enactment, we were compelled to give to the word "approval" a meaning which it never had either in usage or according to the lexicographers. Under that decision the mayor is required "to approve," however much he may disapprove, and even though he may have a well-grounded belief that he is assisting in the perpetration of a wrong. If the duty of the mayor to approve the estimates of the board of public works is "purely ministerial," it being so held to give effect to the intent and purpose of the act creating the board of public works and defining its duties, I cannot see why under similar conditions and for like reasons it should not be held to be equally mandatory

upon the city council to appropriate for the use of the fire and police departments the amount found by that board to be necessary and specified in its estimate.

Even granting the construction contended for by appellants it cannot be said that the city council was in terms or by implication given any power to inquire into the needs and necessities of the fire and police department. This would be an absurd conclusion because, being divested of all power and control over the department they would not be in a position to know anything about its needs or necessities. The only discretion that the city council could have in any event would be to determine whether the condition of the city finances would permit the appropriation of the amount demanded, not whether in the opinion or judgment of the council the condition of the city finances would permit. This involved merely the ascertaining of a condition, which could be determined simply by an arithmetical computation or calculation. It involved no element of judgment or discretion, as it must exist in order to defeat mandamus. After the estimate of the fire and police board was presented all that remained for the city council to do was to compute what the probable amount of revenue derived from taxation during the current year would be, which could be readily ascertained, the amount of the levy having been fixed and the valuation of the assessable property known, and then ascertain whether the amount required by the board, added to the amount of salaries, etc., which the city was compelled by the charter to pay, would exceed the amount of the receipts.—*Manor v. McCall*, 5 Ga. 525; *Arberry v. Beavers*, 6 Tex. 464.

Another question has been presented and argued, and may be at least referred to even though not discussed in the majority opinion. Conceding that mandamus will not lie to control discretion and judgment,

there are cases in which it may lie to control an abuse of discretion if the cases are otherwise proper.—*Wood v. Strother*, 76 Calif. 549.

See note to *Weeden v. Town Council of Richmond*, 98 Am. Dec. 375. In this case it cannot be gainsaid that there was a gross abuse of discretion on the part of the city council. Without waiting to receive proper notices from the officers designated by law and upon notice from whom alone the council was permitted by law to act, as to the amount of the assessed valuation of property within the city limits, and without waiting to receive from the fire and police board or requesting it to present an estimate of the amount of money which the necessities of that department would require during the coming year, long before the expiration of the time in which the council was required to fix the rate of the tax levy and before the time when such rate was usually fixed, without therefore having information as to what amount of money would be required for the proper administration of the affairs of the city government during the coming year, it hurriedly fixed the tax rate and at a figure much less than the amount the law would have permitted it to fix. If it had levied a slightly greater rate there would have been ample funds to have satisfied all of the requirements of the fire and police board as well as the needs of other departments of the city government according to the estimate of the mayor and the council. Can a city council be thus permitted to evade its duty even though it be conceded to have some discretion in the premises? Can it rely upon a condition improperly and improvidently brought about by its own act to defeat a writ of mandate which alone could furnish an adequate remedy? The condition of the city finances would have permitted an appropriation of the full amount required by the fire and police board if the council

had fixed a higher rate of tax levy, which it could have done and still have kept within the taxing limits prescribed by charter. Can it now turn around and defeat the application for and issuance of a writ of mandate by pleading its own willful failure and dereliction of duty? To so hold would be a travesty upon law.—*Lexington v. Board of Education* (Ky. Court of Appeals), 65 S. W. 828.

I do not, however, feel it necessary to discuss at length the effect of these acts of omission and commission nor their bearing upon the question of the issuance of a writ of mandamus, because my conclusion is that the city council had no judgment or discretion in the premises; that the power vested in it by the statute was purely ministerial, and that the duty upon it to make the appropriation required by the estimate of the fire and police board was mandatory.

To one who has been an observer of, or is conversant with the history of municipal government in the United States it is a fact well known that it has been and is the most serious problem of the age. To its solution the most eminent publicists and profound thinkers have devoted much study to devise a system and impose such restrictions as would correct abuses and stamp out corruption. It has been a herculean task and thus far the experiments tried have not been attended with complete success. If current public history is to be believed the advancement in ingenuity and fertility of expedients to evade laws of those who profit by municipal frauds seems to more than keep pace with the progress of those who honestly seek reform. It is also generally known that in all the various branches and departments of city government that of the police has furnished one of the most fruitful fields for such abuse and corruption. There always have been such abuses and in view of

the past I am not optimist enough to believe that the time will ever arrive when they will entirely cease. I do believe, however, that to statutes enacted by the legislature in the laudable attempt to at least minimize these abuses public policy and the public good require, and hence also not only the law of reason but the law of the land as pronounced by the highest authorities, a liberal construction to be given to effectuate the ends proposed, and that their intent, object and purpose should not be frittered away, dissipated and entirely defeated by a stringent or doubtful interpretation. It is my opinion that the conclusions of the trial judge were correct and in accordance with law, and that his judgment should be affirmed.

[No. 2114.]

HARTMAN ET AL. V. REID ET AL.

1. Tax Sales—Redemption—Presumptions—Burden of Proof.

Property sold for taxes cannot be redeemed by one having no interest therein. When application is made to redeem, it is the duty of the treasurer to determine whether the applicant has such interest in the property as will entitle him to redeem, and where a redemption is effected, the presumption of law is in favor of the judgment of the treasurer in allowing the redemption, and the applicant will be presumed to have had the requisite interest, and the burden is on the person attacking such redemption on that ground to rebut such presumption by evidence.

2. Tax Sales—Certificates—Assignment—Burden of Proof.

In an action by one claiming as assignee of a certificate of purchase at a tax sale, where the assignment is put in issue by the answer, the burden is on the claimant to establish such assignment by evidence, and in the absence of such evidence defendant is entitled to judgment.

3. Appellate Practice—Abstract of Record—Evidence—Presumptions.

Where the abstract of record does not contain all the evidence, it will be presumed that the evidence was sufficient to sustain the judgment.

Appeal from the District Court of Gunnison County.

Mr. THOS. C. BROWN and Mr. E. M. NOURSE, for appellants.

Mr. DEXTER T. SAPP, for appellees.

THOMSON, J.

Suit by S. B. Hartman and E. P. Creighton against W. J. Reid and the treasurer of Gunnison county.

The complaint alleged that on the 3d day of November, 1894, William McMillan, at a tax sale in Gunnison county, purchased a tract of land lying in that county, and received from the county treasurer the proper certificate of purchase; that afterwards, on the 20th day of December, 1896, McMillan sold and assigned the certificate to these plaintiffs; that on the 9th day of December, 1897, the defendant Reid paid to the treasurer the amount necessary to redeem the land from the tax sale, and received from that officer a certificate of redemption of the property; that subsequently, but on the same day, the plaintiffs presented their certificate of purchase to the treasurer, and demanded of him a tax deed to the land, but he refused to receive the money or execute the deed; that the plaintiffs and their assignor had paid all taxes assessed and levied against the property from the time of the tax sale to the time of their demand for a deed, and that Reid, when he paid the redemption money to the treasurer, had no right, title or interest, legal or equitable, in or to, any part of the property, but was an entire stranger to the title.

The answer of the defendants put in issue the assignment to the plaintiffs of the certificate of purchase, and denied that the defendant Reid was a stranger to the title, averring that he was in possession of the land under a written contract for its pur-

chase by him, executed by C. M. Smith, the owner. This averment was denied by the replication. The trial resulted in a judgment for the defendants, and the plaintiffs appealed.

The plaintiffs, according to the abstract of record which they have furnished, offered no evidence. The defendants proved the contract from Smith alleged in their answer, and introduced a deed to the property from Lyman H. Cole to Smith and a person named Donnell. It is quite evident from the frequency of stars and the omissions of folio numbers, that the abstract does not contain all the evidence. Without some reason more cogent than any appearing here, we never resort to the transcript of the record in behalf of an appellant; and our disposition of this case will be made without other information than that which the abstract affords.—*Thompson v. Ditch & Reservoir Co.*, 25 Colo. 243; *Johnson v. Spohr*, 12 Colo. App. 317.

Land sold at a sale for taxes may be redeemed by the owner, his agent, assignee or attorney; or by any person who has a claim in it, legal or equitable.—3 Mills' Ann. Stats., sec. 3905. The right of redemption is statutory, and can be exercised only as the statute prescribes. One having no interest in the property cannot redeem. When application for a redemption is made, it devolves upon the treasurer to determine whether the applicant has such interest in the property as will entitle him to redeem. In reaching his conclusion, he acts in a *quasi* judicial capacity; his allowance or disallowance of the claim, is his judgment upon the evidence before him; and the presumption of law is in favor of the judgment. Because the defendant Reid was allowed to effect this redemption, presumptively, he had the requisite interest in the property; and the burden was upon the plaintiffs, in the first instance, to offer evidence re-

butting the presumption. But the plaintiffs offered no evidence whatever, first or last. The only evidence upon the question was introduced by the defendants, and that, so far as it went, was corroborative of the finding of the treasurer. Moreover, the allegation of the complaint that the certificate of purchase had been assigned to the plaintiffs, was put in issue by the answer; and by failing to offer evidence they left the title to the certificate in McMillan and confessed themselves without right to bring or maintain this action. No proof was necessary from the defendants, because they were entitled to judgment on the silence of the plaintiffs; but what they made did them no harm.

However, as respecting the interest of Reid in the property, if we should concede the theory on which the plaintiffs proceeded, namely, that the presumption was in their favor, and that before it was incumbent upon them to speak, the defendants must, by deraigning title from the United States down, establish the necessary interest in Reid, there should still be an affirmance of the judgment below. The evidence which is missing from the abstract, may have supplied the necessary proof. Not knowing what it was, we must assume that it was sufficient to warrant the judgment. The legal presumptions are all in favor of the judgment, and the condition of the evidence as it is presented to us, renders them conclusive.

Let the judgment be affirmed. *Affirmed.*

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[No. 2075.]

THE DENVER & RIO GRANDE RAILROAD COMPANY
v. FOTHERINGHAM.

1. Negligence—Burden of Proof—Railroads—Passengers.

The general rule is that the party charging negligence must

prove it. But where a passenger on a railroad is injured in an accident to the machinery, appliances, or means provided for his transportation, he is only required to prove the fact of the injury and show that it was caused by the failure or insufficiency of some of the agencies provided for the carriage, and the burden is then transferred to the carrier to show its freedom from fault and that the accident could not have been prevented by the utmost skill, care and prudence.

2. Same—Instructions.

Plaintiff, a passenger on a railroad car, was injured by the sudden jerking of the car while stopping at a station, which caused the plaintiff to be violently thrown against the door-facing and at the same time caused the open door of the car to suddenly swing shut, which caught and injured plaintiff's hand. Held, that the injury was not caused by any accident to the train or car or to the machinery or appliances used by defendant for the transportation of passengers such as would relieve plaintiff of the burden of proving that the injury was chargeable to defendant's negligence, and an instruction which relieved plaintiff of such burden and placed upon defendant the burden of showing that the injury was not chargeable to its negligence, was reversible error.

3. Same.

Where in an action against a railroad company the court by an erroneous instruction placed the burden of proof upon defendant to show that the accident was not due to its negligence, the error was not cured by another instruction which told the jury that the burden was upon plaintiff to prove the negligence of defendant.

Appeal from the District Court of Arapahoe County.

Messrs. WOLCOTT & VAILE and Mr. Wm. W. FIELD, for appellant.

Mr. EWING ROBINSON, for appellee.

' THOMSON, J.

Appeal by The Denver & Rio Grande Railroad Company from a judgment recovered against it by Maud Fotheringham for injuries received by her while a passenger on one of the company's trains. Her complaint alleged that after Castle Rock station—one of the regular stations of the defendant com-

pany—had been announced, the car in which she was riding was, through the neglect and careless conduct of the defendant, “suddenly started and put in motion, and immediately thereafter jerked up to a stop, without warning or notice to the plaintiff, causing the open door of said car to swing forward, and at the same time causing plaintiff to be violently thrown forward and against the right door-jamb of the open front door of said car; that in the endeavor to save herself from injury and from being thrown down and between the cars of the train, plaintiff seized the left jamb of said front door of such car, and as plaintiff did so, the open door swung shut against her hand, whereby it was severely injured and bruised,” etc.

The defendant answered denying negligence on its part, and averring that the negligence of the plaintiff was the cause of the injury she received. Contributory negligence was denied in the replication.

The testimony of the plaintiff and her husband was that they were riding to Colorado Springs on tickets purchased from the defendant’s agent in Denver; that as the train was approaching Castle Rock, and was about to stop, a brakeman called out the name of the station; that Mr. Fotheringham thereupon arose, and went out through the open door upon the platform of the car, for the purpose of taking a photograph of the rock; that plaintiff and her husband had been sitting together in the front end of the car, and, shortly after he left, she started to follow him; that before she reached the door, the car commenced to jerk, and she was thrown against the right side of the door; that to steady herself she put out her hand against the door-jamb, where the door could come in contact with it; that in the jerking, the door flew shut and caught her hand, and that when the accident occurred she was not upon the platform.

The plaintiff called a witness, named Michaels,

who said he had, for about ten years altogether, been in railroad employ. He knew nothing about this case, but, in answer to hypothetical questions, he mentioned various causes which he said might produce jerking of a car when in motion; such as, failure to release air properly; putting on the air too hard; the sticking of brake shoes, caused sometimes by wear, and sometimes by being adjusted too tight; the lagging of the wheels when the brakes stick, causing the train to slide down; or, otherwise, the shaking of the car by the shock of the brake shoes.

Daniel Prescott, assistant district attorney of Arapahoe county, was a witness for the plaintiff. His testimony was that he was a fellow passenger with the plaintiff at the time of the accident; that he occupied a central seat in the car, looking in the direction in which the train was moving; that he saw a lady, who he thought was the plaintiff, going out through the front door and saw the door fly shut; that when the door shut there was no one near the door in the inside of the car; that after the plaintiff was hurt he gave her such assistance as he could; that there had been a rumbling, jumping sound, as of brakes slipping on the wheels, which produced a jarring or trembling of the car; and that this jarring, frequently noticeable on freight trains, was not uncommon in passenger cars, witness having often observed it. Mr. Fotheringham said that the jerky motion of the car when coming to a standstill, occurred at every station at which the train stopped between Denver and Castle Rock.

When the plaintiff rested, the defendant asked the court to direct a verdict in its favor on the ground that the evidence for the plaintiff failed to show negligence on its part, and showed contributory negligence on the part of the plaintiff. The motion was denied, and the defendant examined a number of wit-

nesses in its own behalf, the general tenor of whose testimony was to exculpate the defendant, and place the blame upon the plaintiff; but, for the purposes of this opinion, we do not think an examination of their statements necessary. When the evidence was all in, the defendant unsuccessfully renewed its motion for the direction of a verdict in its favor. At the instance of the plaintiff, the court gave the following among other instructions to the jury:

“1. You are instructed that the contractual relation existing between passenger and carrier for hire exacts from the carrier the highest degree of care and skill, and that all means have been taken beforehand to guard against all dangers that may beset the passenger, as far as human care and foresight can go. To this end the carrier must provide a safe roadbed, well-constructed cars, engines, and skillful, trustworthy servants to take charge of the movement and management of the train. All these things are under the exclusive control of the officers of the company; the public have no right and no opportunity to interfere in regard to them; when, therefore, a passenger is injured by a collision or other accident while on his journey, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, car or other appliances involved in the accident, upon the one party in a condition to bear it, namely, the carrier which has the exclusive possession and care of it; the legal presumption takes the place of the proof which the injured person is unable to make, and puts the carrier at once upon the defense.

“2. You are instructed that plaintiff has established a *prima facie* case when she shows that she was injured while being carried as a passenger by defendant, and that the injury was caused by the

manner in which the defendant used or directed some agency or instrumentality under its control. It is the rule, that when the thing which causes such injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

Those instructions should not have been given. The general rule is that the party charging negligence must prove it. There is, however, an exception to the rule; and it is in the substitution, in the instructions, of the exception for the rule, that their erroneous character consists. When a passenger is injured in an accident to the machinery, appliances, or means provided for his transportation, it is unnecessary for him, in the first instance, to do more than prove the fact of the injury, and show that the accident in which it was received was due to the failure or insufficiency of some of the agencies provided for the carriage. When such proof is made, the burden is transferred to the carrier to show its own freedom from fault, and that the accident was one which the utmost skill, care and prudence could not have prevented. The reason for the rule is that the carrier is, and the passenger is not, familiar with the instrumentalities and appliances used by it for the purposes of transportation, and with all the details of its management, so that it has the means at its command to show the facts, and if it is free from blame, to exonerate itself; while such proof is necessarily, at least in many instances, entirely beyond the passenger's reach. But the rule does not apply in the case of an accident unconnected with the means of transportation.—*Stokes v. Saltonstall*, 13. Pet. 181; *Curtis v. R. R. Co.*, 18 N. Y. 534; *Herstine v.*

R. R. Co., 151 Pa. St. 244; *R. R. Co. v. MacKinney*, 124 Pa. St. 462; *R. R. Co. v. Ritter's Administrator*, 85 Ky. 368; *Saunders v. Railway Co.*, 6 S. D. 40.

There are cases in which the doctrine is denied, but it has received the express sanction of our own supreme court, and is the law in this state.—*Wall v. Livezey*, 6 Colo. 465; *Sanderson v. Frazier*, 8 Colo. 79.

The injury received by the plaintiff was not caused by any accident to the train, or to the car in which she was riding, or to any of the appliances or machinery used by the defendant in the transportation of passengers; nor was it the result of conditions which the law presumes to be peculiarly within the knowledge of the defendant. The evidence gave rise to no presumption which imposed upon the defendant the duty to prove itself blameless; and it devolved upon the plaintiff to establish her charge of negligence in the first instance. Whether she produced any evidence whatever that the defendant, or any of its employees, was negligent in any particular, is, to say the least, doubtful. It was not made to appear that the peculiar motion of the car to which the plaintiff ascribes her injury, is, when a train is coming to a stop, unusual, or attended with danger, or even inconvenience, to passengers remaining in their seats. The contrary is to be inferred from Mr. Prescott's testimony; and at the other stations where the train stopped, the same "jerking" motion does not appear to have given the plaintiff any annoyance. But even if it might be conceded that she made a *prima facie* case of negligence, the instructions were fatally erroneous. If there was evidence from which a jury might find that the injury suffered by the plaintiff was chargeable to negligence of some kind for which the defendant was responsible, those instructions did not submit the question. They authorized the jury to presume negligence from the fact

of the accident. It is true that the court elsewhere gave an instruction that the burden was upon the plaintiff to prove the negligence of the defendant; but it could not undo the mischief it had occasioned, by merely contradicting itself. It did not belong to the jury to say in which of the court's irreconcilable declarations it was right, and in which it was wrong; nor is it possible for us to know which they followed.

The judgment must be reversed.

Reversed.

[No. 2118.]

CAMPBELL ET AL. V. THE EQUITABLE SECURITIES
COMPANY.

1. Bills and Notes—Negotiability—Mortgages.

A provision in a promissory note secured by deed of trust, to the effect that if any of the interest coupons should remain due and unpaid for thirty days the note and accrued interest might immediately be collected according to the tenor of the deed of trust, does not import into the note the terms of the deed of trust so as to render the note non-negotiable.

2. Same—Payments—Principal and Agent—Release.

A promissory note and deed of trust securing the same were executed to a securities company in Colorado, but the note and coupons were made payable at a bank in New York. The note was transferred to another company soon after its execution. The payor remitted the money to the payee, the Colorado company, to pay the coupons as they fell due, so that the money should reach its office several days before maturity, and always received an acknowledgment of the receipt of the money and later received the coupon. One of the letters acknowledging receipt of the money by the payee company stated that the coupon would be sent when received from the holder. The holder of the note collected all the coupons at the New York bank except the last, which was collected from the Colorado company. The payor paid the principal to the Colorado company, who converted the money and failed to pay it to the holder. Held, that the payor was charged with notice of the transfer of the note, and that payment to the Colorado company was not a satisfaction of the note, and a release of the trust deed by the trustee at the request of the Colorado company was void.

3. Same—Innocent Purchaser.

Where a loan company loaned money and took a deed of trust to secure the same and part of the consideration was that it should pay off a former negotiable note and deed of trust on the same land, and did remit the money to pay off the same to the payee of the note, who caused a release to be executed by the trustee in the former deed of trust, but the note having been transferred before maturity, the payee converted the money and failed to pay it over to the holder, the company making the second loan was charged with notice of all that was disclosed by the former deed of trust, and stood in no better position than the payor of the note, and was not an innocent purchaser.

Appeal from the District Court of Weld County.

Mr. H. N. HAYNES and Mr. Jas. W. McCREERY,
for appellants.

Mr. C. H. BRIERLY, for appellee.

THOMSON, J.

On the 12th day of July, 1889, Robert S. Campbell conveyed to Henry J. Aldrich certain real estate in the deed described, in trust, to secure the payment of the following note:

“\$2,580.00. Denver, Colo., July 12, 1889.

“On the first day of July, 1894, value received, for money loaned, I promise to pay to the order of The Colorado Securities Company, twenty-five hundred and eighty dollars, with interest on the same at the rate of two per cent per month, after due, until paid. And I hereby agree that if default is made in the payment of any one of the coupons hereto attached or any part thereof, and the same shall remain due and unpaid for the period of thirty days, in such case this note, with interest accrued thereon, shall at the option of the legal holder hereof, become due and payable and may be demanded and collected immediately, anything herein contained to the contrary notwithstanding, according to the tenor of a certain deed of

trust, bearing even date herewith, given by Robert S. Campbell to Henry J. Aldrich, trustee. Payable at the office of the Importers' and Traders' National Bank, New York City. Robert S. Campbell."

The trust deed was immediately recorded. Attached to the note were ten interest coupons for semi-annual interest from July 1, 1889, until its maturity. The coupons, like the note, were, by their terms, payable at the Importers' and Traders' National Bank of New York City. The Equitable Mortgage Company purchased this note with the attached coupons about the 29th day of July, 1889, and the payee endorsed it as follows:

"Pay to the order of Equitable Mortgage Company without recourse.

"The Colorado Securities Company,
by H. J. Aldrich, President."

The trust deed contained an agreement for the payment by Campbell of an attorney's fee of one hundred dollars in case of the institution of a suit; for the insurance by him of the buildings; for the payment by him of all taxes; and for the repayment of any money expended by the payee or its assigns, or by the trustee, for the protection of the title; and provided that in case of default in payment of the notes or interest at the time, in the manner and at the place, specified for such payment, or, in case of waste, nonpayment of taxes or breach of any condition or agreement contained in the deed, on application of the holder of the note, the trustee might, after thirty days published notice, sell the premises at public vendue to the highest cash bidder, deliver to the purchaser a deed of conveyance, and apply the proceeds of the sale, first, to expenses, including an attorney's fee of one hundred dollars, and commissions, second, to the repayment of expenditures for insurance, taxes, assessments or the protection of the

title, and, third, to the payment of the amount due on the note.

The Equitable Securities Company was organized to continue the business of the endorsee as its successor, and received the notes with the other assets. All the coupons except the last, were presented by the Equitable Mortgage Company at the Importers' and Traders' Bank in New York City, and were there paid. There being no funds in the bank for the payment of that coupon, it was collected from Aldrich in June, 1895. Campbell, supposing that the note remained the property of The Colorado Securities Company, always remitted the interest money to it, and, in compliance with its request, made each remittance in time to reach the company's office on the 25th day of the month preceding the maturity of the coupon. At each payment he received from the company an acknowledgment of the receipt of the money. The coupon came later. We do not know what was the usual form of the acknowledgments, for the abstract contains only two of them, one of which reads as follows:

"The Colorado Securities Co., Denver, Colo.
Farm Loans and Investment Securities.

"Robt. S. Campbell,

"Dear Sir: Your favor of received enclosing \$77.40 to pay interest to July 1, 1892. Coupon will be sent you when received from the holder.

"Colorado Securities Co.

"July 1, 1892.

By H. J. Aldrich."

On the 25th day of June, 1894, Campbell executed a deed of trust, whereby he conveyed to George S. Adams, public trustee of Weld county, the property described in the trust deed to Aldrich, to secure the payment to The Farm Investment Company of his note of that date for \$3,500. Part of the consideration of the note was the agreement of the

investment company to pay the note which had been given to The Colorado Securities Company. On the 21st day of June, 1894, The Farm Investment Company, in attempted performance of its agreement, remitted the amount due on that note to The Colorado Securities Company. The holder of the note received none of the money except the amount of the last coupon, which, as we have seen, he obtained from Aldrich.

On the 5th day of December, 1894, Aldrich, as trustee, executed to Campbell a deed of release, reciting the full payment of the note made to The Colorado Securities Company, and releasing the land by which it was secured from the lien of the trust deed. That release, and the trust deed to Aldrich were both duly recorded.

This proceeding was instituted by the Equitable Securities Company to obtain a decree cancelling the deed of release, appointing a proper person to act as trustee in the place of Aldrich, and awarding other appropriate relief. Campbell and The Farm Investment Company were made parties defendant.

The defense interposed is that the provision in the note that if any of the interest coupons should remain due and unpaid for thirty days, the note and accrued interest might be collected immediately according to the tenor of the deed of trust, imports into the note the terms of the trust deed and renders the instrument non-negotiable, so that the defendants, having no notice of the transfer of the paper, will be protected in their dealings with the payee. The assumption of want of notice requires some modification as we shall see hereafter. The language of the note referring to the trust deed, merely permits immediate foreclosure for the collection of the whole debt, in case of default for thirty days in the payment of any interest coupon. To collect the note according

to the tenor of the trust deed would simply be to take the steps prescribed by that instrument for subjecting the land to its payment. The provision gave the holder special permission to do, before the maturity of the paper, exactly what he might do afterwards, without other authority than that expressed in the trust deed, and in no manner affected the personal liability of the maker. The maker promised to pay a sum certain upon a day certain, and the instrument was, therefore, a negotiable promissory note.—1 Daniel on Negotiable Instruments, § 43; *Cowan v. Hallock*, 9 Colo. 572; *Frost v. Fisher*, 13 Colo. App. 322; *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417.

But we do not see how, in view of the facts which have been laid before us, a concession of the non-negotiability of the paper would be of any benefit to either of the defendants. The fact that a note is not negotiable is no excuse for knowingly or negligently paying it to the wrong person. Campbell employed The Farm Investment Company to pay his note, furnishing it the money for the purpose. The remittance to The Colorado Securities Company was made by him through his agent, The Farm Investment Company, and its act was his act. In view of a number of things which he knew, in remitting for the payment of the note to The Colorado Securities Company, he assumed the risk of the disposition by that company of his money. He made the note and coupons payable at the office of the Importers' and Traders' National Bank of New York, and by the deed of trust securing the paper, he specially stipulated that a failure by him to pay the note or interest at that particular place would put him in default, and authorize a foreclosure. He therefore knew that the money was payable at the office of that bank, and nowhere else; and that it was there that he must expect to find his note. Possessed of such knowledge, Campbell's act

in trusting his money to The Colorado Securities Company without receiving his note in exchange, was grossly negligent. But this is not all. The receipt from The Colorado Securities Company for the money sent it to pay the interest due July 1, 1892, advised Campbell that he must wait for his coupon until it could be received from the holder. The only inference to be drawn from that language is that the coupon did not belong to The Colorado Securities Company, and that before it could be forthcoming, the holder must receive his money. The information conveyed by the receipt demanded inquiry by Campbell to ascertain whether the holder of the coupon was not also the holder of the note to which it was attached, as well as all the other unpaid coupons. Such inquiry would have disclosed the real situation, and Campbell is charged with knowledge of the facts to which it would have led.—*Appelman v. Gara*, 22 Colo. 397.

Campbell's defense is wholly without equity.

Nor is the position of The Farm Investment Company any better. Its situation was not that of an innocent purchaser. It loaned its money and took its security while the trust deed to Aldrich was an acknowledged encumbrance. That trust deed described the note as payable at the office of The Importers' and Traders' National Bank of New York. The investment company is conclusively presumed to have known that the note and coupons were payable at that bank, because the record disclosed the fact; and for the same reason it is charged with knowledge that payment anywhere else, unless made directly to the holder, would not be a payment. The trust deed expressly so provided. It was its duty to know that the place to send the money for the payment of the note, was the Importers' and Traders' National Bank in the City of New York, and not The

Colorado Securities Company's office in the city of Denver; and it will be held to a knowledge which it ought to have possessed. It also knew that, as a negotiable promissory note, the paper was liable, at any time before it matured, to be in the hands of an innocent holder for value; and such knowledge emphasized its obligation to forward the money to the designated place of payment. It agreed with Campbell to pay his note, but it negligently failed to do so, and lost his money. There is nothing in its case which appeals to a court of equity.

As against the plaintiff, this deed of release was void from the beginning. The trust deed securing the note has, ever since its execution, been, and now is, in full force, and the only effect of the release is to cast a cloud upon the security of the plaintiff.

The judgment will be affirmed.

Affirmed.

[No. 2105.]

**PEDRONI V. EPPSTEIN, AS TRUSTEE FOR DENVER LODGE
No. 171, INDEPENDENT ORDER OF B'NAI B'RITH.**

1. Evidence—Ownership—Houses—Presumptions.

In an action for damages for removing and converting houses used as residences, where the evidence established title in plaintiff to the lots on which the residences stood, plaintiff is presumptively the owner of the houses in the absence of evidence to the contrary.

2. Evidence—Instructions—Damages.

In an action for damage for the removal and conversion of certain houses and the conversion of certain cows, where the uncontradicted evidence showed that plaintiff was the owner of the property and that defendant, without authority, removed and appropriated the houses, and that persons in whose possession plaintiff had left the cows, without any authority sold them to defendant who took and retained them, it was not error to submit to the jury only the question of damages.

3. Trustees—Action by—Statutory Construction.

Session laws 1897, page 248, providing that any person trading or doing business under the firm name of trustee shall file

with the county clerk an affidavit setting forth the full names and addresses of all the parties who are represented by the trustee, and in default shall not be permitted to prosecute any suits for collection of his debts until such affidavit shall be filed, does not apply to actions in tort.

Appeal from the District Court of Logan County.

Mr. H. N. HAYNES, for appellant.

Mr. ALFRED MULLER, for appellee.

GUNTER, J.

Plaintiff sued in tort to recover as damages the value of two houses and four cows. From a judgment for plaintiff defendant appeals. At the conclusion of the evidence the court submitted to the jury one question—the damages sustained.

The evidence without conflict showed plaintiff the owner of certain village lots. Upon these were two residences used therewith; this presumptively established him the owner thereof.—*Dooley v. Crist*, 25 Ill. 551. There was no evidence to rebut this presumption. Defendant without authority removed and appropriated the houses. The cows plaintiff owned. They were left in possession of two parties for use; these parties without real or apparent authority from plaintiff sold them to defendant, who took and retained them. No evidence in conflict with these facts.

There was under the evidence but the above question of damages to go to the jury. The charge as to its submission is unchallenged.

Session Laws 1897, p. 248, prescribes that any person trading or doing any business under the firm name of trustee shall file with the county recorder an affidavit setting forth the full names and addresses of all the parties who are represented by the trustee, and in default of filing such affidavit such person so trading and doing business shall not be permitted to

prosecute any suits "for collection of his debts" until such affidavit shall be filed. Fine or imprisonment is prescribed as a penalty for violation of the act. The affidavit was not filed. Appellant contends that its absence should abate the action. As to this objection it suffices to say, the statute applies only to suits for the collection of debts. This suit is not in the nature of an action for debt, it is an action in tort; it was not within the statute. The statute is highly penal and should be strictly construed. It does not embrace an action of tort.—*Wood v. Erie Ry. Co.*, 72 N. Y. 196, 28 Am. Rep. 125.

Section 2468, Pomeroy's Civil Code Calif., is similar to the statute before us except the absence of a penal clause. As construed it does not apply to actions for torts.—*Ralph v. Lockwood*, 61 Calif. 155.

There was no error below justifying a reversal.

Judgment affirmed.

Affirmed.

Thomson, J., not sitting.

[No. 2116.]

CANFIELD ET AL. V. ARNETT.

Bills and Notes—Counterclaims.

In an action upon a joint and several promissory note, one of the makers may interpose as a counterclaim an indebtedness upon contract due him from plaintiff.

Appeal from the County Court of Boulder County.

MESSRS. PATTERSON, RICHARDSON & HAWKINS and
Mr. GUY D. DUNCAN, for appellants.

Mr. S. T. HORN, for appellee.

GUNTER, J.

Plaintiff sued upon this note:

"\$355 25-100 Boulder, Colo., Aug. 4, 1898.

"One day after date we or either promise to pay

to the order of Marg G. Arnett Three Hundred Fifty-five and 25-100 dollars at Boulder, Colo. Value received. Int. 10 per cent. per annum. Frank Canfield, Nettie Canfield."

As a counterclaim Frank Canfield set up an indebtedness, upon contract, due him from plaintiff. By demurrer the objection was made and sustained that plaintiff's cause of action was joint; the cause of action stated in the counterclaim several; that such several cause of action did not constitute a counterclaim against the cause of action of plaintiff.

The ruling is assigned as error. The sufficiency of the counterclaim is determined by section 57, Mills' Ann. Code, reading thus: "The counterclaim * * * shall be one existing in favor of the defendant * * * and against the plaintiff * * * between whom a several judgment might be had in the action," being the same as section 58, Code 1877, which was taken from the code of California. See 438 Civil Procedure, Codes Calif. Mr. Pomeroy, interpreting this section of the California Code, said: "When defendants in an action are jointly and severally liable, although sued jointly, a counterclaim consisting of a demand in favor of one or some of them may, if otherwise without objection, be interposed."—Pomeroy's Code Remedies, 3d ed., § 761. This citation approved, *Roberts v. Donovan*, 70 Calif. 108, 114, 115.

"Defendants jointly and severally liable to satisfy plaintiff's demand may set off a demand due from the plaintiff to one of the defendants alone."—Estee's Pleadings, 4th ed., vol. 2, § 3368.

Section 57, our code, is the same as section 150, New York Code, construed in *Parsons v. Nash*, 8 Howard Pr. 454. The following from the syllabus is expressive of the holding: "Therefore held, in an action upon a joint and several promissory note against several defendants, one of them might set off

a judgment recovered upon contract in his favor against the plaintiff."

See also *Plyer v. Parker*, 10 S. C. Reports 464; Amer. and Eng. Ency. of Law, vol. 22, p. 404.

This question has not been ruled otherwise in this state.

Thatcher v. Rockwell, 4 Colo. 375, held that a copartnership could not offset in an action against it a claim of one of its members against the plaintiff.

In *Ingols v. Plimpton*, 10 Colo. 538, 16 Pac. 155, a copartnership sued an individual defendant. The defendant sought to set up as a counterclaim a several debt owing him by one of the partners. Denied.

In *Thalheimer v. Crow*, 13 Colo. 397, 22 Pac. 779, plaintiff sued upon appeal bond; the principal thereon was not a party defendant; the defendant sureties sought to counterclaim a judgment in favor of the principal on the bond against the plaintiff. Denied.

In *Woolman v. Capital National Bank*, 2 Colo. App. 454, 31 Pac. 235, it was ruled that in a suit by a copartnership against the maker of a promissory note, the maker could not offset a claim which he held against one of the copartners.

The mere statement of the above cases distinguishes them from the one at bar. In each of those cases except in the Thalheimer case the effort was to offset a several claim against a joint claim. Here the effort is to set off a several claim against a plaintiff who is entitled to a several judgment upon the cause of action involved, against this defendant.

For the same reasons error was committed in sustaining the demurrer to the counterclaim of the defendant Nettie Canfield.

Judgment reversed with instructions to overrule the demurrers.

Reversed.

[No. 2102.]

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BLACKMAN V. EDSALL ET AL.

1. Estates of Decedents—Wills—Probate—Appeal Bonds.

In an appeal to the district court from a proceeding in the county court probating a will, where there was no executor or administrator of the estate, the appeal bond properly ran to the estate of the deceased.

2. Jurors—Challenge for Cause—Harmless Error.

The erroneous overruling of challenges for cause to juries is not prejudicial where it appears that neither of the jurors challenged served on the jury, and does not appear that the challenging party exhausted his peremptory challenges in order to get rid of them.

3. Wills—Contests—Undue Influence—Evidence.

In the contest of a will on the ground of undue influence, the evidence required to establish the undue influence need not be of that direct, affirmative and positive character, which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.

4. Same—Verdict of Jury.

In the contest of a will on the ground of undue influence where the province of the jury is to draw conclusions from conceded or undisputed facts the verdict of the jury should not be disregarded except for grave reasons clearly apparent.

5. Same.

In the contest of a will on the ground of undue influence all circumstances which tend to throw any light upon the question should be considered by the jury.

6. Same—Instructions.

Instructions on the issue of undue influence in the execution of a will discussed and approved.

Error to the District Court of Arapahoe County.

Mr. EDWARD R. MORRIS and Messrs. MORRISON & DeSoto, for plaintiff in error.

Mr. JOS. H. MAUPIN AND Mr. O. S. ISBELL, for defendants in error.

WILSON, P. J.

In October, 1898, Mrs. Lizzie DuBois, a widow

sixty-two years of age, died possessed of property valued at about \$12,000.00. Her sole heirs at law were four grandchildren, all minors, the children of a deceased daughter, her only child, who are defendants in error herein as contestants of the will of the deceased. Soon after the death of Mrs. DuBois the plaintiff in error presented to the county court for probate what purported to be her last will and testament, executed about four weeks before her death. By the terms of the will, after directing the payment of two small bequests of \$200.00 each, one to her "faithful nurse and housekeeper" and the other to her brother, the one-half of the residue of all her property was bequeathed to her four grandchildren before mentioned in equal proportions, the same to be turned over to them as they should each become of full legal age. The remaining one-half was devised to the plaintiff in error with the remainder at his death to his two children. The plaintiff in error was designated as executor of the will without bond. Neither Blackman nor his children were of kin to the testatrix, and the father had been for several months prior to her death her agent and attorney in fact in the management of her property. In response to the citation issued from the county court the defendants in error, the grandchildren and natural heirs of the deceased, appeared and filed objections to the probating of the will on the ground that at the time of its alleged execution the testatrix lacked testamentary capacity, and also that it was executed through the undue and improper influence of the plaintiff in error, Blackman. Upon hearing in the first instance in the county court it was found that the will should be admitted to probate, and from this appeal was taken by the defendants in error to the district court. There trial was to a jury, whose verdict was in favor of the contestants. In response to two several interrogato-

ries submitted the jury found that the testatrix was of sound mind at the time of executing the will, but that undue influence was exercised over her by the proponent, Blackman, to procure the making of the will. The general verdict was that the will was not the will of decedent. Judgment was thereupon rendered declaring the instrument not the will of decedent and refusing it probate, and the plaintiff in error brings it here for review.

On the day of the commencement of the trial, but before the jury was sworn, the proponent filed a motion to dismiss the appeal on the ground that the appeal bond, which ran to the estate of Lizzie DuBois, was not a bond with proper parties nor one upon which suit could be maintained by the proponent. The motion was denied and this is assigned for error. Waiving the question as to whether this motion even if well founded at all was interposed in proper time—the appellee having previously entered his general appearance and the motion not being made until the very day the case was set for trial and had commenced—we do not think that there was error in denying it. In an ordinary action there must be a plaintiff, one who institutes the suit, and a defendant. Upon appeal in such cases the statute requires that the bond shall run to the adverse party but the proceeding under consideration is totally unlike an ordinary action in many respects. The proponent who produces the will may not be a party to the proceeding, indeed, may have no interest whatever in it. The statute requires that any person having in possession any last will shall within a certain time after the death of the testator present the same to the county court of the county for probate.—Gen. Stats., sec. 3490; Mills' Ann. Stats., sec. 4661. But no statute requires that he shall thereby become a party to a suit or to any proceeding by which he might become liable for any costs.

It is immaterial by whom a will is presented.—*In re Will of Storey*, 120 Ill. 249. In fact, there are no parties to the proceeding in a county court to probate a will. When the will is produced the court may proceed of its own motion. The proceeding is *in rem*. The judgment is *in rem*, and is not for or against any party. From it any person interested may appeal.—*In re Storey*, 20 Ill. App. 188.

In this case the court after declaring that the proceeding and judgment were *in rem*, said: "And if so, how can the proceeding be said to be *inter partes*? The judgment is what determines and it is simply a declaration on the will and not a judgment for or against appellant or any other person interested. The appeal is the method provided by law by which the circuit court gets jurisdiction to pronounce a judgment in the matter. It is not an appeal for the purpose of reviewing the judgment of the court below, but is the transferring of the case into a forum where it is to be heard *de novo*, on original evidence, and where evidence may be introduced which is not competent on the hearing in the probate court. The statute gives to any party in interest the right to so transfer the case by appeal, but when once in the circuit court the party so bringing it into court stands in the same relation to the proceeding as any other party in interest. The question in the circuit court as in the probate court is simply will or no will, and the judgment of the court when rendered unless reversed or set aside in some proceeding for that purpose, is binding on all persons whether in any manner they appear as formal parties on the record or not. On the trial the parties may arrange themselves upon the issue as in favor of or in opposition to the pro-

bate of the will, and all those who seek to have the will admitted to probate become proponents, and those who oppose it become contestants."

In *Fuller v. Estate of Fuller*, 7 Colo. App. 556, this court, in considering the statute controlling appeals from county courts in probate matters (Laws 1891, p. 109, sec. 3; 3 Mills' Ann. Stats., sec. 1097) held that an appeal in such cases even when taken by an executor or administrator was in effect the appeal of the estate. This being true, we think it reasonably and logically follows that in a proceeding of this kind where there is no executor or administrator and which is not a civil action having parties plaintiff and defendant, the party adverse to the appealing contestants, if there be any at all, is the estate of the decedent upon which administration is sought. There can be no executor until after the will is probated and hence it would seem within reason that the party adverse to the contestants could be the estate of the decedent only until probate had been finally effected. In a proceeding to probate, the costs thereof are taxable against the estate, not against the person who had possession of the will and who presented it for probate. In an appeal by contestants the only object of an appeal bond is to protect from the payment of costs the person or party who might become liable therefor by reason of the appeal and that one is the estate. In our opinion the court properly denied the motion to dismiss.

It is also alleged for error that the court improperly overruled a challenge for cause of counsel appearing for the proponent, to two jurors on examination upon their *voir dire*. Whether this was error or not requires no discussion and is immaterial, because it does not appear from the record that even if error, the proponent was prejudiced thereby. Neither of the two jurors was accepted or served on

the jury. It does not appear even that they were peremptorily challenged by the proponent, much less that the proponent was compelled by this action of the court to exhaust his peremptory challenges upon these two jurors. Even though the court erred in failing to sustain the challenges for cause, unless it should appear that the proponent was compelled thereby to accept the disqualified jurors or to exhaust the peremptory challenges allowed to him in order to get rid of them, he cannot complain. The error was without prejudice to him.

The chief complaint and contention of the proponent is that the evidence presented and upon which the jury based its verdict sustaining the charge of undue influence was insufficient by reason of its lacking in that affirmative and positive character which is claimed to be necessary. It follows from the very nature of the thing that evidence to show undue influence must be largely in effect circumstantial. It is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery or other methods to obtain power and control over the will of another and direct it improperly to the accomplishment of the purpose which he desires. Subscribing witnesses are called to attest the execution of wills and testify as to the testamentary capacity of the testator and the circumstances attending the immediate execution of the instrument, but they are not called upon to testify as to the antecedent agencies by which the execu-

tion of the paper was secured, even if they had any knowledge of them which they seldom have. Only general rules concerning the amount and character of evidence required to establish undue influence in the execution of a will can be laid down. As to what is sufficient must depend upon the facts and circumstances of each particular case. These general rules have been stated and restated in many hundreds of different cases in the courts of every jurisdiction considered authority in this country. Different language is used by the different courts, but one main underlying principle, whatever phraseology, is found in all and that is, the evidence required to establish it need not be—indeed cannot be—of that direct, affirmative and positive character which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred. No special reference to these authorities is required, because the rule in its controlling respect which we are now discussing has been clearly stated and positively settled by recent adjudications of both the appellate courts in this state. In this court it was said: "A charge of undue influence is substantially that of fraud, and it can seldom be shown by direct and positive evidence. While it is true that it must be proved and not presumed, yet it can be and most generally is proven by evidence of facts and circumstances which as to themselves may admit of little dispute, but which are calculated to establish it and from which it may reasonably and naturally be inferred."—*Clough v. Clough*, 10 Colo. App. 443. This language has been quoted by the supreme court in a recent case and expressly approved.—*In re Shell's Estate*, 28 Colo. 167, 63 Pac. 413.

It was also said by this court in the *Clough* case and likewise expressly approved by the supreme

court in the Shell Estate case: "As to the character of the evidence admissible, we will only say generally that in proceedings of this nature the issues involved cover a wide field of investigation, and being of that kind seldom susceptible of direct and positive proof the court should be liberal in admitting evidence of all circumstances even though slight which might tend in conjunction with other circumstances to throw light upon the relation of the parties and upon the disputed question of undue influence." Upon the hearing in the district court many witnesses were examined and the record of the testimony is very lengthy, covering six hundred folios. From this fact therefore as well as from the nature of the evidence it would be utterly impracticable even if necessary to give even a summary of it in this opinion, a full and lengthy statement being required if any should be given. We deem it sufficient to say that after a thorough reading and consideration of all the evidence received we think it amply sufficient to sustain the verdict of the jury. It is possible that in cases of this kind where the province of the jury is to draw conclusions from conceded or undisputed facts the ordinary rule that this court will not review the evidence nor disturb a verdict when rendered upon conflicting evidence and there is sufficient to support it, does not apply. It is equally true, however, that in these cases the verdict of the jury is of especial importance and should not be disregarded except for grave reasons clearly apparent. "A jury composed of the average men of the community sit together, consult, apply their separate experiences of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclu-

sions from admitted facts thus occurring than can a single judge."—*Railroad Co. v. Stout*, 17 Wall. 657.

It is obvious, even to the most common understanding, that this is especially true in cases of the probate of wills, where the question to be determined is whether the instrument was executed under and by reason of the undue influence of another. It involves the consideration of a great many facts and circumstances similar to those which the average citizen encounters in everyday life, and from which he is fully as competent, if indeed not more so, to draw a reasonable conclusion as the most learned judge.

Counsel for plaintiff in error complain of some of the instructions to the jury, which were thirteen in number, eight of them being given at their special instance and request. In argument they chiefly attack the one instruction, given at the instance of the contestants, which reads as follows:

"7. You are further instructed that in determining the issues submitted to you under the instructions herein, you should carefully look to all the evidence in this case, and in so doing you should take into consideration the physical condition of the deceased, arising from age, sickness, suffering, by reason of disease or otherwise, or any other cause; the condition of her mind at and before the time of the execution of the will in controversy; the execution of the will and its contents; the situation of the parties present when the will was executed; the relations existing between her and the parties respectively herein at and before the execution of the will in controversy; her family and connections; the terms upon which she stood with them; the claims they or any of them might have had upon her bounty by reason of blood relationship, or otherwise; the condition and relative situation of the legatees and devisees named in the will; the situation of the testa-

trix herein and the circumstances under which the will was made; the condition she was in by reason of her being under the influence of opiates or narcotics, if you find that she was, at the time of the execution of the will, under the influence of opiates and narcotics, and in brief, every fact or circumstance which tends to throw any light upon the question submitted to you."

We think the instruction was entirely proper under the rule announced in the Clough case which we have cited. The evidence as to each and every one of these facts, conditions and circumstances enumerated in the instruction the jury were entitled to consider, and should have considered. It is true no one of them was probably sufficient to have sustained a verdict of the jury either for or against the will, and the jury were not so told. They were told simply that in determining the issue submitted to them it was proper for them and they should consider all of these matters in connection with all other evidence. It is not in our opinion at all open to the charge made by counsel that it in effect told the jury to put themselves in the testatrix's place, and make her will for her. Especially are we confirmed in this conclusion, when as it is the duty of this court to do, we consider this instruction in connection with the others given. Taken as a whole, the instructions stated the law applicable clearly and fully, and were indeed unusually free from error. To guard against the danger which it was apparent counsel for proponent most seriously dreaded, the jury were told in forcible and plain language that the undue influence which would be sufficient to invalidate the will must be such as to destroy the free agency, and substitute the will of another for that of the person acting; which compelled the testatrix to do that which was against her will, from fear, or by constraint, or as

the result of fraud practiced upon her; that in fact the undue influence must have been such as to have destroyed the free agency of the testatrix at the time the will was made. The court further told the jury that the influence acquired over a testator by kind offices unconnected with any fraud or contrivance could never alone be any good ground for setting aside a will, and that in this case if the jury believed that the disposition of property made by the testatrix in her will to the proponent was induced by her affection, gratitude for past kindness, or esteem for him, then it became their sworn duty on this point to find in favor of the will. The jury were further told that any woman of mature age, who at the time of making her will had no husband living, whether she had children or grandchildren or not, had an absolute right to dispose of all or any of her property by her will to any person she pleased, disregarding entirely the expectations of her natural heirs, and disregarding any statements previously made of her intention to leave it to her natural heirs; that they had no right to question the wisdom or assume the folly of the disposition which the testatrix chose to make of her property; that they had no right to avoid the will because they might think she had no sufficient excuse for giving a large share of it to the proponent, nor because it was not such a will as they might think she ought to have made; that if she made the will without undue influence, and while mentally competent to know what she was doing, her right was absolute to give it to any person she chose.

The general and controlling rules and principles in proceedings of this character to which we have referred as being announced and established in this state are supported by the current of authority in other jurisdictions. We refer to a few of the leading, and best considered cases.—*In re Will of Budlong*,

126 N. Y. 423; *In re Liney's Will*, 13 N. Y. Supp. 551; *Denison's Appeal*, 29 Conn. 399; *Harrel v. Harrel*, 1 Ky. 203; *Tyler v. Gardiner*, 35 N. Y. 559; *Chaplin on Wills*, pp. 96, 97, 212; *Cassoday on Wills*, § 484, *et seq.*

We see no material error, and the judgment will be affirmed. *Affirmed.*

[No. 2117.]

STEVENS V. WALTON.

1. Evidence—Value of Services.

In an action to recover for services, plaintiff is a competent witness to testify to the value of his services and may be permitted to answer the direct question of what his services were worth.

2. Evidence—Objections.

Objections to the admission of evidence should be sufficiently specific to enable the court to rule upon them intelligently.

3. Evidence—Skill of Workman—Competency of Witness.

In an action for services as a photographer another photographer who worked with plaintiff was a competent witness to testify as to plaintiff's skill in his work.

4. Evidence—Action for Services—Health of Plaintiff.

In an action to recover for services a statement by a witness on direct examination that the person succeeding plaintiff was a stronger man and could work longer hours does not entitle defendant on cross-examination to question the witness as to the state of plaintiff's health when he entered defendant's employ.

5. Evidence—Appellate Practice—Presumption.

A ruling of the trial court excluding a circular offered in evidence will be presumed to have been correct when the abstract fails to advise the appellate court what the contents of the circular were.

6. Partnership—Evidence.

In an action to charge defendant as a member of a partnership a newspaper article based upon an interview with defendant in which it was stated that defendant was a member of such partnership, was admissible in evidence, although the exact words used by defendant in the interview were not given, where from the evidence of the author of the article and defendant the

jury would be justified in believing that the article was a substantially correct reproduction of the interview.

7. Same.

In an action to charge defendant as a member of a partnership, a newspaper article based upon an interview with defendant and stating that defendant and another had formed such partnership, a perusal of which led plaintiff to apply to the supposed partnership for employment, is admissible in evidence whether a correct reproduction of defendant's language or not, where it is shown that defendant saw the article and knew that it resulted from an interview with him, and made no effort to have it corrected.

8. Instructions—Action for Wages.

In an action for the value of services where there was no evidence that plaintiff entered the employ of defendant under an agreement whereby he was to receive no pay, an instruction to the effect that if he did enter the employ of defendant under such contract, then, unless the plaintiff proved a later contract with defendant whereby he was to receive pay, the jury must find for defendant, was properly refused.

Appeal from the County Court of El Paso County.

Mr. JOHN M. HARNAN and Mr. J. S. DANSEY, for appellant.

Mr. H. McGARRY and Mr. L. H. ROUSE, for appellee.

THOMSON, J.

W. R. Walton brought suit against F. P. Stevens and W. E. McChristie to recover wages which he claimed they owed him for services rendered. The action was commenced before a justice of the peace, and there being no written pleadings, the nature and amount of the claim must be found in the evidence. From that it appears that the plaintiff charged the defendants, as partners, doing business under the name of The Nonpareil Portrait and Publishing Company, and that the services for which he claimed compensation, consisted in printing and toning certain pictures, printing and finishing standard views of

Colorado scenery, and doing general photo work. Summons was served on Stevens only; McChristie did not appear. The jury found for the plaintiff, and Stevens is here by appeal from the judgment entered on the verdict.

There was evidence to warrant the jury in finding that Stevens held himself out as a partner with McChristie, and there was some evidence that there was an actual partnership between the two men—notably a bond executed by Stevens to McChristie, at the time their business relations ceased, which recited a sale by McChristie of his interest in the business, stock and fixtures, to Stevens; the latter assuming all the obligations of the business. The evidence also supported the finding of the jury as to the amount which was due the plaintiff; and unless Stevens' case was prejudiced by error committed at the trial, or in the giving or refusing of instructions, the judgment below must be affirmed.

In the printed argument for the appellant, most of the assignments of error have been abandoned; and we shall notice those only upon which reliance is now specifically placed.

The plaintiff was asked what his services rendered for the defendants were worth. Stevens objected to the question as immaterial, incompetent and irrelevant. In support of his objection, he refers us to the case of *Republican Publishing Co. v. Miner*, 12 Colo. 77, in which it was held that the statement of a witness that his understanding of a publication alleged to be libelous, was that it charged the offense of an attempt to commit murder, was improperly admitted; and to the case of *R. R. Co. v. R. R. Co.*, 67 Ill. 142, which is equally irrelevant. A person is presumed to know the value of his own services, and is a competent witness to such value. The objection was very properly overruled.

H. J. Olmstead, a witness for the plaintiff, was interrogated as follows:

"Now, from what you know of photography at this time, and what you saw of Mr. Walton's work there, state to the jury what degree of skill he had as a workman in that occupation?"

The question was followed by this from Stevens:

"Defendant objects as incompetent."

Objections should be sufficiently specific to enable a court to rule upon them intelligently. We think this one hardly meets the requirement. The court allowed the question to be answered; and, regardless of the sufficiency or insufficiency of the objection, we think the ruling was right. The witness had been engaged by the side of the plaintiff, in the same kind of work, and, from his testimony, would seem to have been quite familiar with its details, and a very good judge of its merit when done. His answer was: "As far as I can judge, I would say that Mr. Walton's work was very good."

We think he possessed the qualifications necessary to enable him to testify.

In his cross-examination of Olmstead, Stevens' counsel asked him this question:

"Now, what was the state of Mr. Walton's health when he entered the employ of the Nonpareil Portrait and Publishing Company, if you know?"

The court sustained an objection to the question on the ground that it was not proper cross-examination. For Stevens it is said that in the direct examination of the witness, the plaintiff's counsel brought out testimony concerning his health, and that, therefore, the cross-interrogatory was proper. While the witness was being directly examined, and while he was testifying concerning a Mr. Lombard, who had succeeded the plaintiff in his position with the Nonpareil Portrait and Publishing Company, he was

questioned as follows, returning the annexed answers:

"Q. You may state whether he (Lombard) could do any better work than Mr. Walton?

"A. He could do a greater variety, but I don't think any better.

"Q. Could he do any more of it?

"A. He was a stronger man, and could work longer hours."

It is in this last answer that counsel find the evidence concerning the plaintiff's health, which they say entitled them to a response to the question. That simply because one man is physically stronger than another, there is something wrong with the latter's health, is a new proposition to us. In the present state of our knowledge, we are compelled to disagree with counsel, and to hold that the court was right in excluding the proposed testimony.

A printed circular of some kind, marked "Exhibit G," and offered in evidence by Stevens, was rejected by the court. Counsel say the ruling was error. We do not know what the paper contained. The following is all the abstract says about it: "Exhibit G. This is an advertising circular used by the Nonpareil Portrait and Publishing Company to advertise the business at both the main and branch offices."

Without further information on the subject than the foregoing imparts, we must presume that the court ruled correctly.

The court admitted, over Stevens' objection, an article published in the Colorado Springs Gazette prior to the plaintiff's employment by the Nonpareil Publishing Company, in which, among other things, it was stated that a partnership had been formed between McChristie and Stevens, and in which the nature of the business they proposed to carry on was described. It was a perusal of this article that led

the plaintiff to apply to the supposed partnership for employment. The objection to it was that it was hearsay. Mr. McKay, a reporter for the Gazette, and the author of the article in question, was examined for the plaintiff concerning it. He testified that it was the result of an interview he had with Stevens, and was based on information he received from Stevens; that while he did not use Stevens' exact words, and while he could not say that Stevens said a partnership had been formed, the contents of the article were in harmony with the statements Stevens made, and that in writing it, he followed the impressions Stevens' talk had produced on him. Mr. Stevens admitted the interview, saying he stated to Mr. McKay that a photographer told him there appeared to be a good field in that part of the country for a photocopying and enlarging business; intimated that he (Stevens), having a considerable reputation, would be a valuable man to represent him (the photographer); and made a proposition, but made no definite conditions on the subject of partnership. The court then asked the witness: "Is what you have stated what you told McKay?" The answer was: "As near as I can remember it is; I went into details that way, and I told him that finally the arrangements were consummated for business, and we should go into business in that way; I told McKay all that, but of course I did not expect for him to write all these details up, and he made a third of a column article out of it." Stevens was examined further by his counsel as follows:

"Q. Did you pay Mr. McKay anything for that? A. No, sir.

"Q. Did you see the article in the Gazette? A. Which?

"Q. The article in question? A. Yes, I saw it.

"Q. Did Mr. McKay represent facts as you

stated them to him? A. No, not exactly; I just looked at it as like almost all such newspaper items, the accuracy of which wasn't the chief value of the thing to our enterprise; it was just the fact that something was going to be done, and we wanted people to know that something was going to be done; I laughed about the article a good deal."

The fact of the interview is established by the testimony of both parties to it. Stevens said that the article did not state the facts exactly as he gave them. We would infer from his use of the word "exactly" in the connection in which it occurs, that he regarded the difference as slight. McKay testified that he did not reproduce Stevens' exact words, so that there does not appear to be any important disagreement between the witnesses. A jury would be justified by the evidence in believing that the article was a substantially correct reproduction of the interview.

But, after all, whether it was correct or not is immaterial. Stevens saw the publication when it appeared; he knew that it resulted from his interview with McKay; and if it reported his statements untruly, it was his duty, in order that the public might not be misled, to cause the proper corrections to be made. But he found no fault with the article; he wanted the people to know that something was going to be done, apparently regarding accuracy of statement as unimportant; and instead of attempting to correct false impressions which it might produce, he "laughed about the article a good deal." He was entirely willing that, true or false, it should be believed. He thus made himself responsible for the statements in the publication, and so held himself out to the world as a partner with McChristie. It would have been error to exclude the article.—See *Fletcher v. Pullen*, 70 Md. 205.

Stevens complains of the refusal of the court to give the following instruction:

"If the plaintiff entered the employ of the Nonpareil Portrait and Publishing Company under a contract whereby he was to receive no pay, then, unless the plaintiff has proved that there was a later contract between the plaintiff and the defendant, Stevens, as a partner, whereby the plaintiff was to receive pay, you must bring in a verdict in favor of the defendant Stevens."

There was no evidence that the plaintiff entered the employ of the Nonpareil Portrait and Publishing Company under a contract whereby he was to receive no pay. No witness testified that there was any such contract. That instruction, if given, would have misled the jury, and it was the duty of the court to refuse it.—*Fisk v. Electric Light Co.*, 3 Colo. App. 319.

We have now disposed of all the assignments of error to which our attention has been directed in the argument for Stevens. The court submitted the questions arising upon the facts by instructions which are unobjectionable, and the judgment entered on the verdict must be affirmed.

Affirmed.

[No. 2669.]

PERKINS v. BOYD.

Appellate Practice—Failure to File Record in Time—Dismissal.

The failure of an appellant to file his record with the appellate court within the time prescribed by the code does not of itself deprive him of his appeal. An appeal will not be dismissed because the record was not filed within the required time, where the motion to dismiss was not made until after the record was filed, and where it appears that no prejudicial delay has been caused by the failure to file the record within the prescribed time.

Appeal from the District Court of El Paso County.

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Mr. C. J. PERKINS, for appellant.

Mr. H. MCGARRY, for appellee.

Per Curiam.—This cause having been appealed more than thirty days before the commencement of the January term, 1902, of this court, the record should have been lodged in the office of the clerk of this court not later than January 15, being the third day after the beginning of said term.—Code, sec. 389.

It was not so lodged, however, until February 28, following.

Appellee moved to dismiss the appeal on the ground of this failure, but said motion was not filed until April 7, 1902, long subsequent to the actual filing of the record.

The code section has been directly passed upon by the supreme court in a case involving a precisely similar state of facts, and it was there held that the failure of appellants in this respect did not of itself deprive them of their appeal.—*Thalheimer v. Crow*, 13 Colo. 403, citing *Sparrow v. Strong*, 3 Wall. 103.

Upon the authority of this decision, and it further appearing that no prejudicial delay has been occasioned by the failure of appellant, the motion to dismiss will be denied.

Motion denied.

[No. 2573.]

ROSEBERRY V. THE VALLEY BUILDING AND LOAN
ASSOCIATION.

1. Appellate Practice—Failure to Pray Appeal Within Time—
Jurisdiction—Appearance—Waiver.

The requirement of the code that an appeal must be prayed for within five days after judgment is rendered is jurisdictional, and where an appeal was prayed for more than five days after the judgment was rendered, the appellee by entering a general appearance in the appellate court, does not waive the require-

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ment, but the appeal must be dismissed upon motion made at any time before final hearing and judgment.

2. Same—Dismissal—Redocketing on Error.

Where an appeal is dismissed because not prayed for within five days after the judgment was rendered the cause will be redocketed on error if the appellate court would have jurisdiction of the cause if brought up by writ of error.

Appeal from the District Court of Teller County.

MESSRS. TEMPLE & CRUMP, for appellant.

MESSRS. PARKER & SCOTT, for appellee.

Per Curiam.—The judgment from which an appeal is sought in this case was rendered April 22, 1901. On May 29, following, at a subsequent term of court, and not until then, was an appeal prayed for.

The right to an appeal is purely statutory, and to be available, the statutory terms and conditions upon which the right is given, must be complied with.—*Clelland v. Tanner*, 8 Colo. 253; *Colorado Springs L. S. Co. v. Godding*, 20 Colo. 72; *Tierney v. Campbell*, 7 Colo. App. 300; *Mercer v. Mercer*, 13 Colo. App. 244.

An express statutory condition upon which an appeal is allowed and may be taken, is that the appeal be prayed for within five days after the time of rendering the judgment or decree.—Code, sec. 388.

This provision of the code is jurisdictional. In the *Godding* case, *supra*, it was said: "This court is without jurisdiction by appeal, for it appears from the record before us that * * * the appeal was not prayed for until fifteen days after" judgment was rendered. Upon the express authority of this and other cases in which the question has been passed upon by both appellate courts it would seem that where there had been a failure to pray for an appeal within the statutory time, and the jurisdiction is chal-

lenged upon that ground, the appellate court has no discretion other than to dismiss the appeal.

It is contended, however, that in this instance the requirement has been waived by a general appearance of the appellee in this court, and by the long delay in presenting the motion to dismiss. We may concede that the facts of the case would be sufficient to justify the court in holding that there has been a waiver, if there can be such where the other party appears at all, and challenges the jurisdiction before final hearing and judgment. It is well settled by repeated and numerous decisions of both appellate courts that jurisdiction by appeal cannot be conferred by consent. Joinder in error cannot confer it nor waive it.—*Gordon v. Gray*, 19 Colo. 167; *Thorne v. Ornauer*, 6 Colo. 39.

A waiver in any case is really implied consent by a failure to object. Counsel in discussing waiver do not distinguish between cases where the appellate court has original jurisdiction of the subject-matter, and those where it has not. In this case, this court has jurisdiction only by appeal, and has no original jurisdiction of the subject-matter. If the latter were true, the result might be different.

The motion of appellee to dismiss the appeal for lack of jurisdiction must be sustained. In accordance, however, with the provisions of section 1, page 80, Laws 1893, being section 388a of Mills' Annotated Code, the clerk will be ordered to enter the action as pending on writ of error.

Appeal dismissed.

[No. 2665.]

MOYNAHAN V. PERKINS.

Appellate Practice—Failure to File Assignment of Errors—Dismissal.

The rules of the court of appeals requiring an appellant to

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assign errors in writing at the time of filing the transcript and providing that in case of failure to assign error the appeal may be dismissed, do not necessarily require a dismissal in all cases, because of a failure to assign errors within the time fixed. An appeal will not be dismissed because of a failure to assign errors within the time fixed, where the appellant makes a showing tending to explain and excuse the failure, and where it appears that no material delay nor prejudice to appellee has been caused thereby.

Appeal from the District Court of Teller County.

Mr. B. F. MONTGOMERY, for appellant.

Mr. C. J. PERKINS, *pro se*.

Per Curiam.—Appellee moves to dismiss this appeal upon several grounds, but there are only two which require any notice. One is that no assignment of errors had been filed; the other is that the record had not been lodged in this court within the time required by code section 389. Rule 11 of this court requires an appellant to assign errors in writing at the time of filing the transcript of the record, and rule 12 provides that if appellant shall fail to assign error the appeal may be dismissed. An assignment of errors is of course indispensable to the perfecting of an appeal and to its hearing, but the rule does not necessarily require in all cases a dismissal because of a failure to assign error within the time fixed. In this case counsel for appellant makes a showing tending to explain and excuse his failure in this respect. It further appearing that no material delay has been occasioned by it and that the appellee has not been prejudiced thereby the motion will not be sustained on that ground.—*Home v. Duff*, 5 Colo. 344.

The appellant may present and have filed with the clerk of this court a proper assignment of errors within fifteen days from this date. Upon failure so

to do the appellee may renew his motion to dismiss and it will be sustained.

The second ground of the motion is based upon a precisely similar state of facts to that in *Perkins v. Boyd, ante*, page 447, and for the same reasons there given this ground will not be sustained. The motion to dismiss will be denied. *Motion denied.*

[No. 2069.]

THE FIRST NATIONAL BANK OF ASPEN V. THE MINERAL
FARM CONSOLIDATED MINING COMPANY.

1. Bills and Notes—Conditional—Notice—Negotiability.

A deed and an assignment of the grantor's interest in a mining lease was made to a corporation in consideration that the corporation should pay to a third party a certain sum as the money was received from the sale of ores. The corporation by its board of directors adopted a resolution directing its note to be given to said third party for said sum payable on demand, in compliance with the conditions of said deed, and directing its treasurer to pay on said note as fast as practicable sums received from sale of ore. The corporation's unconditional promissory note payable on demand was executed and delivered to said third party. Several payments were made and indorsed on the note. By a subsequent resolution of the board of directors the note was recognized as an unconditional debt of the corporation. The note was transferred for value without notice, to the purchaser, of the deed to the corporation or of its resolution authorizing the execution of the note, but with notice of the payments made on the note and of the subsequent resolution of the board of directors recognizing the note as unconditional. Held, that in an action upon the note the payor cannot be heard to say that the note was a conditional obligation the payment of which depended upon realizing a sufficient sum from the sale of ores.

2. Bills and Notes—Negotiability.

The mere notation upon the face of a promissory note, "This note is secured by quitclaim deed of this date," did not charge a purchaser of the note with notice of the terms of the quitclaim deed nor affect the negotiability of the note.

3. Bills and Notes—Payable on Demand—Maturity—Negotiability.

A demand note falls due within a reasonable time, but what is a reasonable time depends upon the facts and circumstances surrounding the running of such time. If the length of time a demand note has been outstanding taken together with the facts and circumstances surrounding it would justify a reasonable presumption in the mind of the indorsee at the time of indorsement that payment upon the note had been refused or would be refused if demand were made the indorsee takes the note as dishonored, otherwise he takes as a purchaser before maturity.

4. Same.

Where a demand note had run about three months before its indorsement, and a few days before its indorsement the payor had made a payment on the note and by a resolution of its board of directors had recognized the note as an unconditional obligation and made provision for its payment, the facts and circumstances were not such as to raise a reasonable presumption that the note was dishonored at the time it was received by the indorsee.

Appeal from the District Court of Pitkin County.

MR. CHARLES J. HUGHES, Jr., and Mr. R. G. WITHERS, for appellant.

MR. WM. O'BRIEN, for appellee.

GUNTER, J.

Appellant sued upon this note:

“\$6,707.91. Aspen, Colorado, March 7, 1894.

“On demand, after date, we promise to pay to the order of The Famous Mining, Tunnel and Improvement Company Six Thousand Seven Hundred and Seven 91-100 Dollars, with interest at the rate of one per cent. per month until paid, and per cent. attorney's fees if not paid at maturity.

“This note is secured by quitclaim deed of this date.

“Value received.

"The St. Joe and Mineral Farm Consolidated Mining Company,

[SEAL.]

"B. Clark Wheeler, President.

"Attest: E. W. Young, Secretary.

* * * * *

"The Famous Mining, Tunnel and Improvement Co.

"B. Clark Wheeler, Manager.

"B. Clark Wheeler."

From a verdict and judgment thereon for defendant is this appeal.

The facts are: March 7, 1894, Wheeler executed and delivered this deed:

"Know all men by these presents that I, B. Clark Wheeler * * * have sold and do hereby sell, convey and quitclaim to The St. Joe and Mineral Farm Consolidated Mining Company all my interest in the following described property (here follows description of real estate situate in Pitkin county, state of Colorado). And I do hereby transfer and assign any * * * interest that I may have in and to a certain lease and the options and agreements named in a certain lease bearing date October 18, 1888, * * * in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and the further consideration that the said company shall pay to The Famous Mining, Tunnel and Improvement Company, as the money is received from the sale of ores, the sum of six thousand seven hundred and ninety-one hundredths (\$6,707.91) dollars, with interest at one per cent. per month from date until paid * * * .

"In witness whereof I have hereunto set my hand and seal this 7th day of March, A. D. 1894.

"B. Clark Wheeler."

"Recorded March 8, 1894."

March 21, 1894, the board of directors of the St. Joe company passed this resolution: "At a called meeting of the board of directors of the St. Joe and

Mineral Farm Consolidated Mining Company, held at the office of the company * * * there were present * * * the following resolution was then offered * * * Whereas, by resolution of the board of directors of this company it was required of B. Clark Wheeler that he obtain title of the parties holding interests * * * and convey the same to this company, and Whereas, he has obtained interests of the following named gentlemen * * * and has conveyed the same to this company with the provision that the company shall pay from the proceeds of the mine to The Famous Mining, Tunnel and Improvement Company the sum of \$6,707.91, being the balance of the amount paid for interests, with interest to date of transfer to the company at twelve per cent. per annum; it is therefore ordered that the president and secretary of this company shall execute to said The Famous Mining, Tunnel and Improvement Company the company's note payable on demand, with interest at one per cent. per month, said note to be dated the day of said transfer in compliance with the conditions of said conveyance and that the president and treasurer are hereby authorized to pay on said note sums received from the sale of ore as fast as practicable, after paying the running expenses of the company.

"On motion the resolution was unanimously adopted.

"Approved March 22, 1894.

"B. Clark Wheeler, President.

"Attest, E. W. Young, Secretary."

The note in suit was executed and delivered. Payments by check aggregating \$2,487.88, made at eight distinct dates beginning March 17, 1894, and ending May 11 same year, were endorsed on the note prior to its purchase by appellant.

May 14, 1894, the following contract was made

between the directors of the St. Joe company, B. Clark Wheeler, and S. L. Hansbrough: "This contract and agreement made and entered into this 14th day of May, A. D. 1894, by and between The St. Joe and Mineral Farm Consolidated Mining Company, * * * of the first part, B. Clark Wheeler, as joint agent for S. L. Hansbrough and the said company, and S. L. Hansbrough, parties of the second part, and T. G. Lyster, party of the third part:

"Witnesseth: That, whereas, the said party of the first part is indebted to the said party of the third part upon the promissory note of said party of the first part, dated May 10, 1892, to The Continental Divide Mining Investment Company, for the sum of forty thousand dollars, * * *

"And whereas, the said party of the first part, by its certain indenture of lease dated the 22nd day of July, 1893, did grant, demise and let unto the said S. L. Hansbrough, one of the parties of the second part hereto, that certain portion of the mining property of the said party of the first part, known as the Mineral Farm, to have and to hold to the said S. L. Hansbrough for the period of thirty months from the date of the said lease, upon the payment by the said lessee of certain royalties and the performance of certain covenants in the said lease set out, * * *

"And whereas, the said party of the first part is also indebted to The Famous Mining Tunnel and Improvement Company, a corporation organized and existing under and by virtue of the laws of the state of Colorado, upon a certain promissory note made by the said party of the first part to the said Famous Mining, Tunnel and Improvement Company, dated March 7, 1894, for the sum of \$6,707.91, with interest at the rate of one per cent per month, and the party of the first part being desirous of paying and satisfying its said indebtedness above recited, and this

contract having been duly authorized by resolution of the board of directors of the said party of the first part, passed and approved on the 14th day of May, 1894, * * *

"Now, therefore, these presents witness: That the said party of the first part, in consideration of the premises, and in the further consideration of the sum of \$1 to the said party of the first part in hand paid by the said party of the third part, the receipt whereof is hereby confessed and acknowledged, has assigned, transferred, and set over, and does, by these presents, sell, assign, transfer and set over unto the said party of the third part, or his assigns, all royalties due or to become due to the said party of the first part from the said S. L. Hansbrough, one of the parties of the second part, * * *.

"And the said B. Clark Wheeler, one of the parties of the second part, as joint agent of the said party of the first part and the said S. L. Hansbrough one of the parties of the second part hereto shall pay and deliver to the said party of the third part any and all such royalties accruing under said lease * * *.

"And the said party of the third part doth hereby agree to apply the said royalties so to be received by him as follows: (Then after enumerating three different dispositions to be made of the royalties so received provides a fourth.)

"4th. The remainder of said balance, to wit, ten per cent thereof, he shall pay to the holder of said note of the party of the first part to the said Famous Mining, Tunnel and Improvement Company, until the same shall be paid, or until the termination of the said lease * * *."

June 11, 1894, appellant purchased this note paying value therefor without actual notice of the above quitclaim deed of March 7; without actual notice of the resolution of the board of directors above men-

tioned of March 21, and without any intimation of the claim that the note was conditional, but did have actual knowledge of the above payments made upon the note, up to, and including, the payment of May 11, 1894, and of the resolution of the directors just recited, of May 14, 1894, whereby it was distinctly recited that the note in question was an unconditional and existing obligation of the company, and whereby provision was made for payments to be applied on said note.

The Mineral Farm Consolidated Mining Company is the successor by consolidation under the statute to The St. Joe and Mineral Farm Consolidated Mining Company, hence its being the defendant herein.

February, 1895, appellee brought suit against B. Clark Wheeler, who gave the note here sued on, in the name of The St. Joe and Mineral Farm Consolidated Mining Company for an accounting between it and said Wheeler, and took judgment against him for the amount of this note upon the basis that it was an existing obligation of The St. Joe and Mineral Farm Consolidated Mining Company.

There is no substantial conflict in the testimony, the case rests upon the above facts.

Appellee contends that the judgment below should stand, because the note sued on is a conditional contract. Such contention is that the note in suit should be construed in connection with the above quitclaim deed, and that so construed its payment is made dependent upon realizing from the sale of ore funds sufficient for such purpose; that the satisfaction of such condition was not shown, and could not be shown under the pleadings.

It is further contended that appellant had constructive notice of the quitclaim deed and the alleged condition through the memorandum upon the face of

the note, "This note is secured by quitclaim deed of this date." It is further contended that appellant was charged with notice of such alleged condition in the quitclaim deed by the note having been endorsed after maturity.

The quitclaim deed imposes no limitation on the note in suit because it was competent for the St. Joe Company, notwithstanding the agreement between it and Wheeler embodied in such quitclaim deed to give The Famous Mining, Tunnel and Improvement Company an unconditional demand note to cover the amount stated in the deed as payable to such company. If the company saw fit to give such note, the payee company to receive it, and it was so received, and Wheeler did not object, it is not now competent for the payor company to complain that the note does not follow the terms provided in the Wheeler quitclaim deed. Such note was so given, and without objection so received. Knowledge, therefore, by appellant of the quitclaim deed would not have charged him with notice of a limitation upon the note. Again, by the proceedings of the board of directors on May 14, of which this appellant had notice, it was distinctly recognized that the note in suit was an unconditional obligation of the original payor. After such recognition of the note by payor, and the taking of the note by appellant for value, believing the same to be an unconditional obligation, the payor cannot be heard to say that the note was different from what it proclaimed it to be, to wit, an unconditional obligation of the company. Again, the note was recognized as an unconditional obligation of the company by the contract of June 7, 1894, between Hagerman, Bolles and Wheeler, which contract by acting under it the company ratified. Further, the suit begun in 1895, whereby judgment was taken against Wheeler upon the theory that this note was an existing obligation

of the company was a ratification of the making of this note as an unconditional obligation of the company. But even assuming that as between the original parties the quitclaim deed placed a limitation on the note, this appellant had no notice of such limitation. The mere notation upon the face of the note, "This note is secured by quitclaim deed of this date" did not affect the negotiable character of the note. The note as it appeared was an unconditional promise to pay a definite amount on demand with no suggestion upon its face that these unequivocal terms were modified by any other instrument. The memorandum simply advised that as an incident to the note, given for the purpose of securing it, and for no other purpose, there was a quitclaim deed. There was no suggestion in this notation of an intention of the parties to restrict the unconditional terms of the note by the quitclaim deed. That this notation did not charge appellant with notice of the terms of the quitclaim deed is fully sustained by the authorities.

In *Howry v. Eppinger*, 12 Mich. 29, suit was by an endorsee upon a promissory note; on the margin thereof was written, "Secured by mortgage." It was contended that the endorsee was charged with notice of the contents of such mortgage, and that such mortgage contained a condition fatal to recovery. The court said, "The words 'secured by mortgage' formed no part of the notes. The object and intent of the parties in putting these words upon the notes was not to limit or impair their value, but to add to it. It was not to notify third parties that the mortgage contained some clause inconsistent with the notes, and which would destroy or affect their negotiable character. * * * But the principal one (object) was to show that in addition to the responsibility of the makers they were also secured by mortgage. If the makers intended to limit the effect of the notes by the

terms or conditions of the mortgage securing their payment, they should have done so by language which would admit of no doubt as to its intent and meaning. We think these words were neither sufficient to inform third parties of the contents or terms of the mortgage, or to put them upon inquiry. * * * It is not the duty of parties about to purchase negotiable paper to make inquiries as to possible defenses, unless either from something appearing upon the face of the paper, or from facts communicated to them at the time, they could not honestly purchase without making further inquiry, in other words, that they acted in bad faith."—See also *St. Joe and Mineral Farm Company v. The First National Bank*, 10 Colo. App. 348, 50 Pac. 1055.

In *Biegler v. Merchants Loan & Trust Co.*, 62 Ill. App. 560, it is said: "The recital by indorsement on the notes that they were secured by a lien upon the maker's interest in certain horses described in a specified agreement, had no effect to put the appellee upon inquiry as to the terms of that agreement. * * * A recital upon a promissory note, to destroy its negotiability, must be of a kind that in some respect qualifies, or makes uncertain, or conditional, the promise."—See also 4th Am. and Eng. Ency. of Law, 2d ed., 141-142.

It is further contended that the mere fact that the note in suit had been outstanding from March 7, 1894, to June 11, 1894, the date of its endorsement to appellant, stamped it as dishonored, and that such fact would let in any defense that could have been urged as between the original parties to the instrument. The authorities are agreed that a demand note falls due within a reasonable time after its making. What is a reasonable time depends upon all the facts and circumstances surrounding the running of such time. If the length of time the note had been out-

standing, taken in connection with all the other facts and circumstances, would justify a reasonable presumption in the mind of the endorsee at the time of the endorsement that payment upon the note had been refused, or would be refused if demand were made, then the endorsee takes the note as dishonored, otherwise not.

“The demand must be made in a reasonable time, and that will depend upon the circumstances of the case, and the situation of the parties.”—*Losee v. Dunkin*, 7 Johnson’s Reports 69.

In this case the facts were not such as to raise a reasonable presumption that this note at the time it was received by appellant was a dishonored note. The circumstances strongly indicated that it was the intention of the St. Joe company as successor of the original payor to pay the note in full, and that it had no defense to interpose to its nonpayment. A large amount had been paid upon the note, and the last payment was but a few days before its purchase by appellant. Further, but a few days before its purchase by appellant, appellee’s liability upon the note, by the resolution of May 14, 1894, was recognized as unconditional and provision made for its payment.

When summed up the evidence disclosed plaintiff in possession, as owner, of the unconditional promissory note of the St. Joe company, executed by its president, attested by the signature of its secretary, and corporate seal. There was no evidence to impair this *prima facie* case. Upon the evidence as adduced the trial court should have instructed a verdict for plaintiff.

Judgment will be reversed.

Reversed.

[No. 2397.]

SYMES, ADMINISTRATRIX OF THE ESTATES OF SYMES, V.
CHARPIOT AS ASSIGNEE OF THE DENVER CAR-
RIAGE COMPANY.

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1. Judgments—Action to Vacate—Direct Attack.

An action brought in the court where a judgment was rendered to vacate such judgment on the ground that no notice or summons was served on the judgment defendant, is a direct attack on the judgment sought to be vacated.

2. Same—Pleading—Estates of Decedents.

Where a defendant in an action died pending the action, and his administratrix was substituted and judgment entered against her as such administratrix without any notice or summons having been served upon her and without any appearance by her in the action, in an action by her in the same court to vacate such judgment, an allegation in her complaint of a meritorious defense to the action in which the judgment was rendered is not essential.

3. Judgments—Parties—Substitution of Administrator—Notice.

Where a party defendant died pending suit, and his administratrix was substituted as party defendant, and judgment rendered against her without any notice or summons having been served on her and without any appearance by her in the action, the judgment was void.

Error to the District Court of Arapahoe County.

Mr. OSCAR REUTER, for plaintiff in error.

Mr. HENRY CHARLES CHARPIOT, *pro se*.

GUNTER, J.

Suit was against the principal and sureties upon an official bond. Among the sureties was G. G. Symes. Defendants answered. Thereafter Symes died. This order was made: "At this day comes William M. McGuire, an attorney of record herein, and suggests to the court the death of the defendant, G. G. Symes, and on his motion it is ordered by the court that the executrix, Sophie F. Symes, be substituted party defendant in place and stead of G. G. Symes, deceased."

Sophie F. Symes received no notice of the application for this order. Judgment was taken against the defendants and Sophie F. Symes as administratrix of G. G. Symes. This judgment was vacated on application of plaintiff therein, dismissal entered as to all other defendants and judgment rendered against Sophie F. Symes as administratrix.

At no time was notice or summons served on the administratrix making her a party to the action. At no time did she in person or by counsel appear therein.

The present action was a proceeding in the district court of Arapahoe county, wherein the above judgment was rendered, to vacate the same; from a judgment dismissing the action plaintiff therein is here on error.

Defendant in error contends:

1. This is not a direct attack upon the judgment assaulted. The contrary is ruled in *Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548.

2. The failure of the complaint herein to allege that a meritorious defense exists to the action in which judgment was rendered, is fatal to its stating a cause of action.

That such averment is not essential is decided in *Wilson v. Hawthorne*, *supra*; *Keely et al. v. East Side Improvement Co.*, 16 Colo. App. 365, 65 Pac. 456, 3 Colo. Dec. 457.

3. Plaintiff in error contends the failure to bring the administratrix into court by notice or process of some character is fatal to the judgment rendered against her.

The question presented is, not whether a judgment against deceased taken after death is void, but whether a judgment taken against his personal representative without acquiring jurisdiction of her person is void. It is immaterial what the rule was at

common law as to death abating an action, our code prescribes—section 15—“An action shall not abate by the death * * * of a party * * * if the cause of action survive * * *. In case of the death * * * the court on motion may allow the action to be continued * * * against his representative * * *.”

The code here prescribes the terms upon which the personal representatives may be made a party, that is, by an order made on motion. Such order is void unless made on notice.—*Taylor v. Derry*, 4 Colo. App. 109, 35 Pac. 60.

No notice of the order making the administratrix a party having been given, it is void.—*Taylor v. Derry, supra*.

As the administratrix was never in any manner a party to the action in which the assaulted judgment was rendered the judgment therein against her was void.

Judgment below reversed.

On Rehearing.

GUNTER, J.

Pending an action against G. G. Symes, and after issue joined, he died. Plaintiff in error became his administratrix. Thereafter, without her appearing, being noticed or summoned, an order was made continuing the action against her as administratrix, and judgment had against her as such. Was this a valid judgment?

“It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction, of either the parties or the subject-matter, is void and a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied on as a valid judgment.”—Black on Judgments, § 218; see also *Smith v. Morrill et al.*, 12 Colo.

App. 233, 236, 55 Pac. 824; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771; *Wilson v. Hawthorne*, *supra*.

The reason for this rule is the right of opportunity to be heard before interests are adjudged. Such reasoning and rule apply to the present case. By operation of law the administratrix (plaintiff in error) was liable for certain of the alleged obligations of the deceased. For such as were not binding upon the deceased, for such as did not survive she was not liable. When sued upon an alleged liability she had a right to the opportunity of availing herself of the above defenses, or any other defense she might have had before being judicially declared liable, and thereby concluded as to her defenses except those jurisdictional. This right was not accorded her; the court never had jurisdiction of her. In consequence the judgment rendered against her was invalid. This was our conclusion in the original ruling, and as this remains unchanged, the petition for rehearing will be denied.

Denied.

[No. 2120.]

SYMES AS ADMINISTRATRIX OF THE ESTATE OF SYMES V.
THE PEOPLE FOR THE USE OF CHARPIOT AS
ASSIGNEE OF THE DENVER CARRIAGE
COMPANY.

1. Estates of Decedents—Judgments—Collateral Attack.

Where pending administration of an estate a judgment against the administratrix was tendered to the county court for filing and classification, an objection to the filing and classification on the ground that the administratrix was substituted as party defendant in the action and judgment rendered against her without any notice or summons having been served upon her and without any appearance in the cause by her, was not a collateral attack on the judgment, and the county court had jurisdiction and it was its duty to have heard the defense of the administratrix to the judgment.

2. Judgments—Void for Want of Jurisdiction.

The defense that a judgment is void for want of jurisdiction of the person of defendant in the court rendering the judgment is available to the defendant in any proceeding on the judgment.

Appeal from the County Court of Arapahoe County.

Mr. OSCAR REUTER, for appellant.

Mr. HENRY CHARLES CHARPIOT, *pro se*.

GUNTER, J.

Pending administration on the estate of G. G. Symes, appellee tendered for filing and classification judgment sought to be annulled in *Sophie F. Symes, Administratrix, Plaintiff in Error, v. Henry C. Charpiot, as Assignee, Defendant in Error*, decided at the present term of this court—*ante*, page 463.

To the filing and classification of the judgment appellant objected that the judgment was void for the same reason as urged in such case pending on error, that is, that the court rendering such judgment never acquired jurisdiction of the person of the defendant therein, Sophie F. Symes, administratrix, and offered to show the absence of such jurisdiction.

The trial court ruled against such contention by appellant on the ground that it was a collateral attack on such judgment, and declined to receive the evidence tendered.

The above case on error and the present case differ merely in this: In the former a complaint was filed in the district court to annul the judgment because the court never had jurisdiction of the person of the defendant therein. In the present case the administratrix as a defense to what was in effect a suit upon such judgment, that is, the application for its filing and classification as a *valid* judgment sought as matter of defense to show that such judgment was *invalid* because the court never acquired jurisdic-

tion of the person of defendant therein. As stated above the county court declined to permit such defense on the ground that it was a collateral attack on such judgment. That it was not a collateral attack is at rest in this jurisdiction.

In *Wilson v. Hawthorne*, 14 Colo. 530, 533, 24 Pac. 548, an action was brought in the county court to recover the balance due upon a certain other judgment formerly rendered in the same court; the answer set up that the defendant in the action in which the judgment sued on was recovered had never been served with summons; had never appeared, and had never authorized counsel to appear for him. These allegations contradicted the record. The court held that a cross-complaint, based upon these facts, for annulment of the judgment stated a cause of action, and said: "Though the authorities are somewhat conflicting upon questions of this kind, we think that the better doctrine is that a judgment rendered without obtaining jurisdiction of the person may be impeached and set aside by a proceeding in equity for that purpose; that in such proceeding the recitals of the record will not be taken to import absolute verity; and also that an action brought upon a judgment pronounced without obtaining jurisdiction of the person of the defendant may be defeated by a proper answer, under a system of procedure allowing equitable defenses to be interposed in all civil actions."

In *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824, judgment had been rendered against a defendant in the district court of one county, execution sued out thereon and placed in the hands of a sheriff of another county. A proceeding in equity was instituted in the last named county to enjoin further proceeding upon the judgment which was claimed to be void by reason of want of personal jurisdiction of defendant by the court rendering the judgment. It was held

that the proceeding was not a collateral attack and that it would lie.

We think that the defense tendered herein in the county court to the filing and classification of the claim should have been entertained.

Judgment reversed.

On Rehearing.

GUNTER, J.

The judgment tendered for classification as a valid judgment was void because rendered without jurisdiction of the defendant, the administratrix.—*Symes, Administratrix, Plaintiff in Error, v. Charpiot, Defendant in Error, supra.*

This defense—lack of jurisdiction of the defendant in the court rendering the judgment—was available to the defendant in any proceeding on the judgment.—*Wilson v. Hawthorne, supra; Smith v. Morrill et al., supra.*

It was within the jurisdiction of the county court sitting for probate business when such judgment was tendered for classification as a claim against the estate to entertain this defense, and if established, as it was, to decline to classify the judgment as a valid claim.

“Whatever may be the law in England, or in any other states of the union, we are clearly of the opinion that, under our constitution and statutes, the county court, in all matters pertaining to probate business, has as ample powers and as full jurisdiction with respect thereto as have the district courts of this state over matters within their jurisdiction.—Constitution, art. 6, sec. 23; Mills’ Ann. Stats., sec. 1054; *Schlink v. Maxton*, 153 Ill. 447.”—*Clemes v. Fox*, 25 Colo. 39, 45, 53 Pac. 225.

We remain of the opinion that the county court should have held the judgment tendered invalid and

should have declined to classify it as a claim against the estate.

Petition for rehearing denied.

Denied.

[No. 1887.]

HIRZEL V. SCHWARTZ ET AL.

Mortgages—Homestead—Defective Acknowledgment.

Where a husband and wife executed a deed of trust on their homestead to obtain an extension of time of an indebtedness due from them to a building and loan association which indebtedness was secured by valid deed of trust on the same premises, such new trust deed will not be cancelled as to the wife's homestead rights because the notary public taking the acknowledgment was a stockholder in the building and loan association, where no offer was made to pay the debt, make good her covenants nor to reinstate the former lien substituted by the new deed of trust.

Appeal from the District Court of Arapahoe County.

MESSRS. MULLER & SUMMERFIELD, for appellant.

Mr. J. C. HELM and Mr. JOHN W. HELBIG, for appellees.

GUNTER, J.

Joseph Hirzel, the husband of appellant, owned certain real estate, part of which was a statutory homestead, also twenty shares of stock in a building and loan association. The husband and wife borrowed four thousand dollars of this association, giving their promissory note, and as security the above stock and a trust deed. This deed was admittedly a lien upon the above real estate and the homestead interest of appellant therein. Having become thereafter delinquent as to interest and taxes in the matter of the loan, they gave an additional trust deed to secure this delinquency. The latter deed was also a lien upon above real estate and the homestead interest of appellant therein. The parties having become

again delinquent as to taxes and interest in matter of the loan, had an accounting with the association and to cover the balance so ascertained, and in substitution of above note and trust deeds gave a new joint and several note, and as security a trust deed on the above premises and the homestead interest of appellant therein. By this instrument they jointly conveyed the premises to the trustee to secure their indebtedness; they covenanted that at the time of making the deed they were well seized of the premises in fee and had good right and full power to convey the same, and that in case of sale by trustee his deed should be a perpetual bar against the trustors to all rights in the land covered by the trust deed. There was no fraud practiced upon appellant in securing her execution to this trust deed; she was advised of all her rights under the statute, and its formalities were observed in the execution of the deed, unless it was in the acknowledgment being taken before a stockholder of above association. By this defect, if one, appellant sustained no prejudice. Under our statute appellant was as competent as her husband to make the new note and the above representations and covenants contained in the trust deed. Through the association relying on the new trust deed being what appellant and her husband represented it to be—a trust deed conveying the real estate and every interest of appellant and her husband therein—the extension of the old loan was secured, and the old trust deed substituted by the new trust deed. Having obtained this result appellant now asks the cancellation of the new trust deed as to her homestead right, contending that the alleged incompetency of the notary invalidated the trust deed. This relief is sought without offering to pay the debt, make good her cov-

enants, or to reinstate the securities which were a lien upon her homestead substituted by the new note and trust deed.

To state the facts is to decide the case.

A sufficient reason for denying the relief appellant seeks is, that he who asks equity must do equity.—*Dillon v. Byrne*, 5 Calif. 455; *Rawley et al. v. Burris et al.* (Tenn), 47 S. W. 176; *Dixon et al. v. National L. & Inv. Co.* (Tex.), 40 S. W. 541.

Affirmed.

[No. 2097.]

LEGERE V. STEWART.

1. Appellate Practice—Exceptions—Judgments—Evidence.

Where trial is to a jury no exception to the judgment is necessary in order to enable the appellate court to consider the question as to whether the evidence was sufficient to support the judgment.

2. Replevin—Termination of Right of Possession—Return.

Where a number of cattle consisting of cows, yearlings and calves were taken under writ of replevin and defendant by answer and cross-complaint claimed the right of possession of all the cattle under a lease, and ownership of one-half of the yearlings and calves as the natural increase during the continuance of the lease, and before trial the term of the lease had expired, a judgment for defendant for the return of all the cattle or for their value was erroneous.

3. Replevin—Verdict—Judgment—Return.

In an action of replevin, a verdict for defendant, "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return of the same," will not support a judgment for the return of the property. The attempt to award a return was not a finding that defendant was entitled to a return as required by code. Power to award a return belongs to the court after the jury has found that the party is entitled to it.

4. Replevin—Damages—Excessive.

In an action of replevin for 40 cows, 30 yearlings and calves and 4 horses, all valued at \$2,000.00, where the property was delivered to plaintiff and detained by him for six months when defendant recovered judgment for its return, an award for \$800.00

damages for its detention was excessive where defendant alleged no special damages.

Error to the District Court of Douglas County.

Mr. CHARLES H. BURTON, Mr. W. T. ROGERS and Messrs. McINTYRE & BRAY, for plaintiff in error.

Mr. JOHN H. REDDIN, for defendant in error.

WILSON, P. J.

This was a suit in replevin begun by plaintiff Legere May 25, 1898, to recover possession of forty head of cows, thirty head of yearlings and calves, and four horses. The complaint was in the usual form, alleging ownership by and right of possession in plaintiff, and the wrongful taking and detention by defendant. In pursuance of the writ the property was seized and turned over to plaintiff, remaining in his possession thereafter. The answer, not filed until October 22, following, denied the allegations of the complaint and set up an affirmative defense in the nature of a cross-complaint. In this it was alleged that on November 1, 1897, the plaintiff by verbal agreement had leased to defendant for the term of one year from that date, the plaintiff's farm, and also the forty head of cows and the horses, and that in pursuance of said agreement plaintiff had placed defendant in possession of said property, and he was entitled to hold the same until November 1, 1898. It was further alleged that by the terms of the agreement the plaintiff was to have as rental one-half the increase of the cows, and one-half of all revenues from the farm, the remaining one-half of increase and revenues to belong to defendant. It was claimed and set up that by virtue of this agreement, the thirty head of yearlings and calves were the joint and undivided property of the parties, they being the increase of the cows during the term of the lease, and of a

lease for the preceding year which it was alleged existed between the parties on the same conditions. The answer or cross-complaint alleged the value of the entire property—cows, yearlings, calves and horses—to be two thousand dollars. A return of the entire property was prayed for, or the value thereof, to wit, two thousand dollars, in case return could not be had, and for eight hundred dollars damages for the taking and withholding. Trial was had on November 30, 1898. The plaintiff not appearing, a jury was empanelled, and after the presentation of evidence on the part of the defendant, a verdict was rendered in his favor, and judgment entered accordingly for the return to him of the entire property, or the payment of two thousand dollars, the value thereof; and also for damages in the sum of eight hundred dollars for the detention. On the next day plaintiff appeared and filed a motion to vacate and set aside the judgment, and for a new trial, and in support of it alleged surprise, and excusable neglect on the part of plaintiff which prevented his appearance at the trial, insufficiency of the evidence to justify the verdict, and that the damages were excessive. This motion was denied.

It is asserted that this court is precluded from considering the question as to whether the evidence was sufficient to support the judgment, because there was no exception saved to the judgment. This court has decided expressly to the contrary, and this contention cannot be upheld. Trial was to a jury, and no exception to the judgment was necessary.—*Bradbury v. Alden*, 13 Colo. App. 215.

The judgment cannot be sustained, because it was not warranted by the pleadings.—*Jensen v. Hyde*, 8 Colo. App. 38; *Gallup v. Wortmann*, 11 Colo. App. 308; *Tucker v. Parks*, 7 Colo. 68.

It expressly appeared according to the aver-

ments in defendant's answer, or cross-complaint, that whatever may have been his right—which it is not necessary here to decide—to the possession of the thirty yearlings and calves, he had at the time of the trial and judgment no right to the possession of the cows and horses. Whatever right to such possession he may have had at the time of the institution of the suit, had terminated thirty days previous to the time of trial, at which date the alleged lease had expired. Conceding that defendant was entitled to possession at the time of the institution of the suit, according to his own pleadings the right did not exist at the time of trial and judgment. This change in the legal right of possession took place after suit brought, and before trial, and being presented as we have said by the pleadings, and also by the evidence, the defendant was in no case entitled to a judgment for the return of such property, or for its value.—*Hammond v. Solliday*, 8 Colo. 611.

The testimony was in harmony with the allegations of the answer and cross-complaint, and hence the evidence was insufficient to support the judgment.

The verdict of the jury, after a general finding as to the issues joined in favor of defendant, was: "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return of the same, etc." The judgment is not even supported by the verdict. The verdict did not find that he was entitled to a return, as required by code section 201. The jury attempted to award him a return, power to do which is nowhere vested in them, and this, too, without any finding as to whether defendant was then entitled to a return. Power to award a return belongs to the court after the jury has found that the party is entitled to it.

We are not advised by the record as to what rule

was adopted or followed in the determination of the amount of damages given to the defendant, but whatever it may have been, it is apparent that the amount awarded was excessive. In the answer and cross-complaint, no special damages were alleged. There was simply an averment of general damages, which would include only those naturally arising from the detention of this property. Conceding the value of the entire property to have been as alleged in the answer, \$2,000.00, an allowance of damages to the amount of \$800.00 for its detention for a period of less than six months, is unreasonable and excessive on its face. It is especially so in this case, where a very considerable portion of the property, the yearlings and calves, could have been of no possible service, but on the other hand, an expense to defendant.

A number of other questions are raised but we do not deem it necessary to pass upon them because they may not arise in the new trial which must be had. The judgment must be reversed, because in our opinion it is not warranted by the pleadings or the verdict of the jury, nor sustained by the evidence.

Reversed.

[No. 2112.]

MABEE ET AL. V. THE PLATTE LAND COMPANY
(LIMITED).

Water Rights—Appropriation of Waste Waters.

Where an irrigation ditch at times ran a surplus of water, which surplus it discharged at its terminus into a natural drain, one who appropriated such surplus or waste water after it was discharged from the ditch acquired a right only to whatever water flowed from the ditch after the ditch company had supplied its own wants and necessities, and did not acquire a vested right to any specific quantity of water, and acquired no right to interfere with the water flowing in the ditch or any of its laterals, and the ditch company was under no obligation to permit any specific quantity of water to be discharged at the terminus of its ditch.

Appeal from the District Court of Arapahoe County.

MR. WILLIAM T. ROGERS, for appellants.

MR. H. RIDDELL, for appellee.

WILSON, P. J.

Plaintiff, The Platte Land Company (Limited), alleged in its complaint that it was the owner of certain described agricultural lands situate near the terminus of a ditch or canal owned and operated by The Northern Colorado Irrigation Company, commonly known as the High Line ditch; that it then was and had been for a number of years planting said lands in agricultural crops; that it was also the owner of certain water rights used for the irrigation of said lands, and which had been and were conveyed to it through said High Line ditch and laterals constructed therefrom, at a point above the terminus of the main ditch; that the defendants who were also cultivating lands in the vicinity had at numerous times by shutting down the headgates, and in sundry other ways, prevented the water from flowing into said lateral ditches, and thereby prevented plaintiff from receiving and using the water to which it was entitled. The prayer was for an injunction restraining the defendants from the commission of such acts as would interrupt the flow of water from said High Line ditch into or through said laterals, etc.

The answer of defendants denied the allegations of matters of fact. For a third defense and by way of cross-complaint, the defendants averred that the High Line ditch discharged its surplus and waste waters into a natural drain or stream made by surface waters which ran through land owned by defendant William A. Mabee, the father of the other defendant; that in thus flowing through the lands of defendant, such surplus water was washing away the banks

and increasing the size of said drain to his damage and injury; that upon complaint of this to the officers of the company owning the High Line ditch, he was told by the president thereof that after such surplus or waste water was discharged from the ditch, the company had nothing further to do with it, and that he, the defendant, could take and use it if he desired, as he pleased; that thereupon defendant built and constructed a ditch from the terminus of the High Line ditch to defendant's land, and thereby appropriated all the waste and surplus water discharged from the main ditch, and had since said time been using said waste water, for the cultivation of crops upon his land; that plaintiff had upon divers occasions obstructed the flow of said waste and surplus water from the terminus of said High Line ditch. The prayer was that the defendant, W. A. Mabee, be decreed the first and prior appropriator of and entitled to all the surplus and waste water discharged from the main ditch, and that plaintiff be enjoined from diverting or interfering with its free and uninterrupted flow. Upon final hearing the court found the probative facts of the complaint in favor of plaintiff, and made perpetual the injunction as prayed for. The plaintiff was also enjoined from in any manner interfering with the use and enjoyment by the defendants of any surplus or waste waters that might be discharged from the High Line ditch. Defendants appeal.

The findings of fact in favor of plaintiff were supported by the evidence; indeed, we do not discover any evidence to the contrary. We cannot see wherein defendants have any right to complain of the decree. They got by it all that they asked for, namely, an order restraining the plaintiff from in any manner interfering with the flow of the waste or surplus water after it was discharged from the main

ditch, and a specific decree that they had a vested right in and were justly entitled to this waste and surplus water after it was discharged. In fact, it does not appear either from the findings or any evidence, that the plaintiff set up any claim whatever to this surplus water, or to any right to use it. Each party in fact, got by the decree all that it or they asked. The evidence clearly showed the facts entitling plaintiff to the use of water from the main ditch to the extent decreed by the court, and justified the decree in its favor. The fact that defendants were entitled to the waste water did not justify them in obstructing the flow of water into the laterals of plaintiff to the extent of its appropriation. The waste water was that which flowed from the ditch after the ditch had supplied all of the wants of those with whom it was under contract to carry to the extent of their contracts,—that alone which flowed from the ditch after the ditch company had supplied its own wants and necessities, whether under contract or otherwise. The ditch company did not become under obligations to defendants by reason of any of the facts alleged to permit any specific quantity of water to be discharged at the terminus of the ditch. The defendants took only that which happened to be discharged, whether it was a large or a small quantity. They acquired no vested right in any particular quantity. To so hold would be to actually defeat the right of a prior appropriator who had made a contract with the carrier ditch to convey the water appropriated by him. Almost the entire argument of counsel is upon the question as to the right to this waste water acquired by defendants by their appropriation and use under the facts alleged. We do not see how this is in the case. In this proceeding, this right of defendants to the entire extent claimed by them is not controverted. All of the allegations in

reference thereto in the answer may be conceded, and yet they would not be in conflict with the facts alleged by plaintiff in its complaint, nor would they tend to defeat the right of plaintiff to the relief demanded by it. It is therefore unnecessary for us to discuss or determine the extent of defendants' rights to this waste water. Plaintiff does not contest them. Whatever they may be, it is only necessary to say that the defendants took and held them subject to the superior rights of prior appropriators, one of whom was plaintiff.

The judgment was manifestly correct in the respect complained of, and it will be affirmed.

Affirmed.

[No. 2134.]

THE CLEAR CREEK LEASING, MINING AND MILLING
COMPANY V. THE COMSTOCK GOLD-SILVER MINING
AND MILLING COMPANY ET AL.

Mines and Mining—Lease—Contracts—Development Work.

A contract for lease of a mine for two years required the lessee to continuously work the mine with reasonable diligence and in a workmanlike manner and to keep the same timbered during the term of the lease, and in case of failure the lease was to become void. The lessee also covenanted to do a certain amount of development work at certain stated periods during the term. Held, that the special covenant to do the development work did not control the general covenant to work the mine continuously, and that a discontinuance of mining operations for two months forfeited the lease, and that the pumping of water from the mine during that two months did not satisfy the covenant to work the mine continuously.

*Appeal from the District Court of Clear Creek
County.*

Messrs. MORRISON & DE SOTO, for appellant.

Messrs. TELLER & ORAHOOD, for appellees.

THOMSON, J.

On the 16th day of May, 1898, a contract in writing was entered into between The Comstock Gold and Silver Mining Company and Edward C. Eddie, whereby the former leased to the latter the Comstock lode mining claim, the Comstock extension lode mining claim, and the Safe lode mining claim, subject to an adjustment of a controversy concerning seventy-five feet of the Comstock claim, for the term of two years, for the purpose of mining. By the terms of the contract the lessee was required to commence work on the premises within one month from its date, "and work the same continuously and with reasonable diligence, in a thorough and workmanlike manner, keeping the same securely timbered in all parts during the term of this lease." The contract also provided that in case the lessee should fail to work the premises continuously, with reasonable diligence and in a workmanlike manner, or should fail to keep the same securely timbered, it should be lawful for the lessor to declare the lease void, and enter upon and take possession of the premises.

On the 21st day of July, 1898, with the consent of the lessor, the lease was assigned by Eddie to The Clear Creek Leasing, Mining and Milling Company. On the 21st day of November, 1898, the lessor caused written notice to be served upon the Clear Creek company, that by reason of its failure to comply with the terms of the lease it had forfeited its rights thereunder, and that it was required to deliver immediate possession of the premises to the lessor. Thereupon The Comstock Gold and Silver Mining and Milling Company entered into the possession of the demised premises.

The purpose of this litigation is to determine whether The Clear Creek Leasing, Mining and Milling Company, on the 21st day of November, 1898, had forfeited its rights under the lease. The proceed-

ing was instituted by the Clear Creek company.

After hearing the evidence, the court found the issue for the defendant, The Comstock Gold and Silver Mining and Milling Company, and adjudged a forfeiture of the lease. The plaintiff appeals to this court.

The abstract of the record furnished by the plaintiff is exceedingly meager, but it is presumed to contain all that counsel regard as important. We find in it sufficient evidence to warrant a finding that there had been no mining operations in the leased premises, through their own workings, for two months prior to the service of notice. There was some evidence that, during those two months, levels were being extended from an adjoining claim, called the Doves Nest, into the leased property, and that it was proposed to operate the latter through them. What amount of such work was actually done, is not stated. It is admitted, however, by counsel for the plaintiff in their argument, that about two months before the notice of forfeiture, the working force was transferred from the Comstock properties to the Doves Nest.

Now, if the continuous work required by the contract to be done upon the demised premises could be done upon the Doves Nest, or through its workings, we find nothing in the abstract to indicate that such work was so done. But even if, as a matter of fact, it was, the evidence, so far as the abstract gives it, is that it was not done by the plaintiff. On the 20th day of September, 1898, the Doves Nest property was leased by its owners to Mr. Eddie, the original lessee of the Comstock, and he assigned the lease to a corporation called The Gold Discovery Company. So far as appears, it was this corporation and not the plaintiff, that did whatever work was done upon the property. The original lessee from the Comstock

company bound himself to work continuously upon the demised premises; and the plaintiff, as his assignee, is held to the performance of his covenants. But on the 20th day of September, 1898, the plaintiff withdrew its working force from those premises, and, except operating the pump, did no further work there. Neither for the purpose of mining within the leased premises did it do further work anywhere.

But it is said that pumping water out of the mine was sufficient to satisfy the requirements of the lease concerning work. We hardly think that counsel advance this proposition seriously. The property was leased for mining purposes. Ore was to be extracted, and out of its proceeds certain royalties paid to the lessor. The men employed for mining purposes were withdrawn, and the subsequent work confined to pumping water. Pumping water is not extracting ore. In connection with mining operations it might be profitable work, but alone it would never produce a dividend.

The lease contained the following covenant:

"Party of the second part agrees that he will do one hundred (100) feet of development work on said property during the second six months of the term of this lease; one hundred (100) feet of development work during the third six months of the term of this lease, and one hundred (100) feet of development work during the fourth six months of the term of this lease."

It is contended that this covenant, being special, controls the general covenant to work continuously. We are not sure that we understand counsel; but if they mean that the lessee was not required to commence work in earnest until the beginning of the second six months, and that in the meantime the requirements of the lease would be satisfied with inconsequential operations, we must disagree with them.

The property was leased for mining purposes; and, while no specified work during the first six months was required, yet the work done must be continuous and diligent, and must be mining work. The plaintiff evidently so understood the situation, for it conducted active mining operations on the property for the first four months. That it then withdrew its force, and discontinued its work, is the ground of complaint in this proceeding, and was sufficient to warrant the judgment rendered in the cause.

We do not wish it to be understood that we assent for a moment to the proposition that the lessee of a mining claim may extract its values through workings upon another claim, not embraced in the lease, and owned by a stranger, without authority from his lessor; but finding that this plaintiff, after it withdrew its force, did no work on or off the leased premises, we regard a consideration of the proposition in this opinion as unnecessary.

The judgment below was right, and must be affirmed.

Affirmed.

[No. 2124.]

JONES V. CARVER.

Judgments—Law of the Case—Title to Office—Emoluments.

In an action to try title to an office a judgment for respondent was reversed by the court of appeals, the opinion of the court stating that relator was lawfully appointed to the office and that his attempted removal and the appointment of respondent were void and that the judgment ought to have been one ousting respondent and putting the relator into possession. When the remittitur was filed in the lower court the term of office in controversy had expired and the parties stipulated that the judgment of the court of appeals should be made the judgment of the lower court, and an order for such judgment was signed. Judgment was then entered for relator for costs without specifically awarding title to the office. In a subsequent action by relator against respondent to recover the fees and emoluments

collected by respondent while wrongfully in possession of the office, the judgment in the former case was sufficient to establish plaintiff's right and he was entitled to recover.

Appeal from the District Court of Douglas County.

Mr. CHARLES M. CAMPBELL, for appellant.

Mr. W. HENRY SMITH and Mr. WILLIAM H. DAVIS, for appellee.

THOMSON, J.

On the 26th day of March, 1892, The People of the State of Colorado, on the relation of William W. Jones, instituted in the district court of Douglas county a proceeding under the statute to try the title to the office of road overseer of that county, charging that Jones was lawfully entitled to the office, and that the respondent, William E. Carver, who was in possession of the office, was a usurper. On the 23d day of December, 1892, a trial was had, which resulted in a judgment in favor of the respondent; thereupon the relator brought the cause into this court by appeal from the judgment.

At its September term, 1894, the cause was heard by this court, and a judgment rendered reversing the judgment of the court below. In the opinion delivered, we held that the relator was lawfully appointed; that the proceedings by which the removal of the relator and the appointment of Carver, were attempted, were void; that the title of the relator to the office was not divested, and no title was acquired by Carver, and that the judgment which ought to have been rendered was one ousting Carver, and putting the relator into possession.—*People ex rel. Jones v. Carver*, 5 Colo. App. 156.

On the 4th day of September, 1894, the remittitur from this court was filed with the clerk of the lower court. On the 3d day of January, 1895, coun-

sel for the parties stipulated in writing as follows:

“State of Colorado, Douglas county, ss.

“In the district court of the fourth judicial district, within and for said county.

“The People of the State of Colorado, on the relation of William W. Jones, plaintiff, v. William E. Carver, defendant. Stipulation.

“The parties hereto by their respective attorneys hereby stipulate and agree that whereas the remittitur in the above entitled action has been filed in the office of the clerk of the district court of Douglas county on the 4th day of December, 1894, that the court shall sign the order hereto attached, that judgment be entered thereon. William Dillon, Charles M. Campbell, attorneys for plaintiff; William H. Davis, attorney for defendant.”

The stipulation was allowed, and the order it mentioned signed as it provided; and both were entered of record in the cause. The following is a copy of the order as so signed and filed:

“The People of the State of Colorado, on the relation of William W. Jones, plaintiff, v. William E. Carver, defendant. Order of judgment.

“An appeal from the judgment entered in this action on the 23d day of December, 1892, having been taken to the supreme court and transferred by that court to the court of appeals, and the said court of appeals having on the 22d day of October, 1894, reversed the judgment of this court, and the remittitur from the said court of appeals having been filed in the office of the clerk of the district court of Douglas county, on motion of William Dillon, Esq., and Charles M. Campbell, Esq., attorneys for the plaintiff, it is ordered that the judgment of the court of appeals be and the same is hereby made the judgment of this court. And that the said plaintiff do have and recover of and from said defendant the

amount of his costs, \$6 68-100, and that he have execution therefor.

(Signed.)

“John Campbell,

“Judge of the Fourth Judicial District of the State of Colorado.”

Thereupon the following judgment was entered in the cause

“The court having this day ordered that judgment be entered herein upon the remittitur from the court of appeals; Now, therefore, it is considered by the court that the said plaintiff do have and recover of and from the said defendant, W. E. Carver, the sum of \$6 68-100, his costs in this behalf laid out and expended, to be taxed, and have execution therefor.”

This action was brought by Jones against Carver to recover from the latter the emoluments of the office received by him while unlawfully in its possession. Judgment was given for the defendant, and the plaintiff appeals.

The facts as we have detailed them were alleged and proved. By the judgment of this court title to the office was in the plaintiff, and the defendant was a usurper. The judgment below was reversed without instruction so that the cause might have been retried, but counsel for the defendant presumably realized the futility of further trial, and joined with counsel for the relator in accepting the judgment of this court and agreeing to an entry of judgment accordingly.

In the case at bar the trial court undertook to give in writing its reasons for its judgment. As nearly as we can understand its opinion the grounds on which it acted were these: That this court directed no specified judgment to be entered by the trial court, but contented itself with a simple reversal, remanding the case for a retrial; that no retrial was had, but that the parties agreed upon a

judgment which was entered by the court, and that the judgment so entered did not award the title but was a judgment for costs only. In its opinion the court seems to have started with the assumption that a judgment in a proceeding to try the title to an office, in order to be effective, must formally grant the title to the successful suitor, and it cited a long list of authorities to show that the judgment of this court was ineffective as "bestowing" title on the plaintiff.

In an action to try the title to land the court does not give title. It finds where the title already existing is, and renders judgment accordingly. Neither in a *quo warranto* proceeding does the court award title. The title in this case existed before the litigation began, and all the court could do was to find who had it. This court could not bestow it; the commissioners of Douglas county had already bestowed it, and the main question was whether they had been successful in taking it away. We held that they had not; that their effort to divest it effected nothing, and that it still remained in the plaintiff. Without a judgment against him on a retrial after the reversal, upon a different showing from that made at first, the opinion of this court remained the law of the case, and the office belonged to the plaintiff. The defendant's counsel presumably realized that the result could not be changed and, upon the stipulation of counsel on both sides the court entered an order that the judgment of this court should be its judgment. Such action of the court was tantamount to a finding by it that the plaintiff was entitled to the office. The formal judgment which followed was a judgment against the defendant for costs. The court seems to have thought that such a judgment in such a case determined nothing. It was the only judgment which at the time could properly

be entered. At the first trial the defendant was in possession of the office and the judgment should have been a judgment against him of ouster and for costs. When the case came up again after it had been remanded by us, the plaintiff's term had expired. He no longer had title to the office, and it was no longer occupied by the defendant. In the lapse of time it was filled by another incumbent regularly appointed. There could therefore be no judgment of ouster; and the title being in the plaintiff the only judgment which could be regularly entered in his favor was a judgment for costs. Even if the record contained no entry concerning title a judgment in the plaintiff's favor for costs would imply a finding of title in him.

The right of the plaintiff having been established he is entitled in this action to recover from the defendant the amount of the lawful fees and emoluments of the office received by the latter while exercising its functions.—*Hunter v. Chandler*, 45 Mo. 452; *Mayfield v. Moore*, 53 Ill. 428; *The People ex rel. Benoit v. Miller*, 24 Mich. 458; *U. S. v. Addison*, 6 Wall. 291.

The judgment will be reversed and the cause remanded, with instructions to the district court to find what were the lawful fees and emoluments pertaining to the office, received by the defendant during the portion of the plaintiff's term occupied by him as road overseer, and enter judgment for the amount in the plaintiff's favor.

Reversed.

[No. 2106.]

GERSPACH ET AL. V. BARHYTE.

1. Appellate Practice — Abstract of Record — Pleading — Sufficiency of Complaint.

Where a cause was tried upon complaint, answer and replication, an objection to the sufficiency of the complaint will not be

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17	489
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considered by the appellate court where the abstract of record fails to inform the court as to the contents of the answer and replication, since the defects, if any, in the complaint may have been cured by the subsequent pleading.

2. Appellate Practice—Abstract of Record—Evidence.

An objection that the evidence is insufficient to sustain a judgment will not be considered by the appellate court, where the evidence is not abstracted, nor printed in the abstract of record.

Appeal from the District Court of Arapahoe County.

MESSRS. LAWS & FREEMAN, for appellants.

MR. RICHARD McKNIGHT, for appellee.

GUNTER, J.

This case was tried to the court upon complaint, answers, replications and evidence, resulting in a judgment for appellee.

It is contended that the complaint failed to state a cause of action.

The sufficiency of the complaint herein can be determined only by a knowledge of the answers and replications. If defects exist in the complaint they may have been cured by the subsequent pleadings. We are not informed by the abstract as to the contents of the answer or replication.

Under our practice if counsel desire to question the sufficiency of any pleading such pleading should be in the abstract and other portions of the pleadings sufficient to understand the question urged. This was not done in the present case. For this reason we decline to consider the question of the sufficiency of the complaint.

It is further urged that the evidence is insufficient to sustain the judgment.

The evidence should be abstracted to justify our considering this question.—*Denver Machinery Co. v. Pub. Co.*, 4 Colo. App. 146, 35 Pac. 192; *Mich. Ins. Co. v. Wich*, 8 Colo. App. 409, 417, 46 Pac. 687;

Woods et al. v. Chellew, 15 Colo. App. 368, 62 Pac. 230.

The evidence has not been abstracted herein, nor is it presented to us outside of the bill of exceptions. Judgment of the lower court will be affirmed.

Affirmed.

[No. 2095.]

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA v. BURCH.

1. Railroads—Fires—Evidence.

In an action against a railroad company for damage caused by fire, evidence that immediately after the passage of defendant's train over its track through plaintiff's farm the fire started at its track, and that prior to the passage of the train no fire was there, was sufficient to warrant a submission to the jury of the question whether the fire was chargeable to the passing train and to sustain a verdict that it was.

2. Corporations—Railroads—Names—Misnomer.

Where a railroad company for convenience designated a portion of its line by a different name than that of the company, and the name so used is not the legal name of any corporation, and an action was brought against it under the designated name and summons was served upon the company and it appeared and defended the action without making any objection to the misnomer, a judgment in the case is as effective against the company as if it had been correctly named if the plaintiff move properly.

3. Evidence—Damages.

In an action against a railroad company for damages for burning hay it was not erroneous to permit a witness to be asked and to answer a question as to whether or not there were small trees growing on the ground where the hay was cut and in the inclosure where it was stacked where the plaintiff claimed nothing on account of the trees.

4. Evidence—Rejection—Harmless Error.

Error committed in rejecting evidence was harmless where the same evidence was admitted by the testimony of other witnesses and was uncontradicted.

5. Instructions—Corporations—Corporate Existence—Estoppel.

In an action against a railroad company an instruction to the effect that if defendant appeared and defended the suit, and ap-

pealed from the judgment of the justice of the peace to the county court, it was estopped to deny its corporate existence, states a correct principle of law and although it was unnecessary, if the defendant was not prejudiced thereby, it was not reversible error.

Appeal from the County Court of Boulder County.

MESSRS. WOLCOTT & VAILE and Mr. WILLIAM W. FIELD, for appellant.

Mr. H. M. MINOR, for appellee.

THOMSON, J.

The appellee brought suit before a justice of the peace against the appellant to recover damages for injury to property occasioned by fire charged to have been set out by the defendant. Judgment went against the latter and it appealed to the county court where judgment was again given against it, and from this it appeals to this court.

It was proven that the fire from which the plaintiff suffered occurred immediately after the passage of a freight train over the track of a railroad running through his farm; that the fire started at the track, and that, prior to the passage of the train, no fire was there. The evidence was sufficient to warrant a submission to the jury of the question whether the fire was chargeable to the passing train, and to sustain a finding that it was.—*U. P. Ry. Co. v. DeBusk*, 12 Colo. 294; *Lumber Co. v. R. R. Co.*, ante, page 275, 68 Pac. 670.

When the plaintiff rested the defendant asked an instruction directing the jury to return a verdict for the defendant. As appears from the argument, the ground of the motion was that no proof had been made showing that the railroad was operated by the defendant. The request was denied. Witnesses were then examined for the defendant by whom it

was proved that the owner and operator of the road was the Chicago, Burlington & Quincy Railroad Company. In relation to the ownership and operation of the road and kindred matters we give the language of the witnesses themselves, as found in the transcript of the record. The following occurs in the examination of E. Hanson, one of the defendant's witnesses:

"Q. What is your business?

"A. Claim agent for the Chicago, Burlington and Quincy.

"Q. Are you or have you been in the employ or pay of the Burlington and Missouri River Railroad Company in Nebraska?

"A. No, sir; I have never drawn any salary from the Burlington and Missouri River Railroad Company in Nebraska.

"Q. Do you know whether or not the Burlington and Missouri River Railroad Company owns any property in the state of Colorado?

"A. I do.

"Q. You may state whether or not during the month of February of the present year The Burlington and Missouri River Railroad Company in Nebraska owned or operated any property in the state of Colorado.

"A. It did not.

"Q. You may state who, if an individual, or what corporation or company, owns and operates the railroad known as the Burlington and Missouri River Railroad in Nebraska, or that portion which runs across Boulder county, Colorado.

"A. The Chicago, Burlington and Quincy Railroad Company operates the line of road running through Longmont and Hygiene and into Lyons in this county, formerly known as the Denver, Utah and Pacific road.

"Q. What was the significance, if you know, of the name The Burlington and Missouri River Railroad Company in Nebraska?

"A. It is for the convenience of keeping the accounts separate from the accounts of the road east of the Missouri river.

"Q. And that portion of the line east of the Missouri river and the portion west of the Missouri river, designated as the Burlington and Missouri River Railroad in Nebraska, are parts of what railroad system?

"A. Of the Chicago, Burlington and Quincy Railroad Company.

"Q. How long, if you know, has the Chicago, Burlington and Quincy Railroad Company owned and operated these two portions of the system that you have spoken of?

"A. To my knowledge since 1891 up to the present time.

"Q. Mr. Hanson, did you or were you instrumental in appealing this case from the justice court to this court?

"A. I was."

Another witness for the defendant, J. W. Williams, was examined as follows:

"Q. What is your business?

"A. An agent for the Chicago, Burlington and Quincy.

"Q. Where are you located?

"A. At Longmont.

"Q. What was your business during the month of February, 1898?

"A. I was located at Longmont, Colorado, and occupied as agent for the Chicago, Burlington and Quincy Railroad Co.

"Q. Were you during the month of February,

1898, agent or employed by The Burlington and Missouri River Railroad Company in Nebraska?

"A. I was not.

"Q. How long have you been employed by the Chicago, Burlington and Quincy Railway Company?

"A. About twelve years.

"Q. Were you at any time since the 26th day of February, 1898, served with a summons in the case of W. W. Burch v. The Burlington and Missouri River Railroad Company in Nebraska?

"A. Yes, sir.

"Q. Do you remember when?

"A. I think along about the 1st of May, if I am not mistaken.

"Q. Were you employed by The Burlington and Missouri River Railroad Company in Nebraska in any capacity?

"A. No, sir.

"Q. Have you been since—

"A. No, sir.

"Q. Are you familiar with the line of railroad owned by the Chicago, Burlington and Quincy Railroad Company in Boulder county, Colorado?

"A. Yes, sir.

"Q. You may state to the jury the termini of that railroad in this county.

"A. The Chicago, Burlington and Quincy operates that line of road known as the Burlington and Missouri River Railroad in Nebraska. It runs from Denver to Lyons, through Longmont and Hygiene.
* * *

"Q. What did you do when you had the summons served on you?

"A. I took it and sent it in to the superintendent's office at McCook, Nebraska. * * *

"Q. If you represent the Chicago, Burlington and Quincy Railroad and had nothing to do with the

Burlington and Missouri River Railroad Company in Nebraska, why did you pay any attention to it?

"A. For this reason. I was satisfied it had reference to our road. I took the summons and had it sent in to the superintendent.

"Q. Is not it a fact that that road of which you are agent of is known as the Burlington and Missouri River Railroad in Nebraska?

"A. Yes, sir.

"Q. And that on their printed matter they have that name—the name of the Burlington and Missouri River Railroad in Nebraska?

"A. They have that printed matter, a large share of it, at the top of which is 'The Burlington and Missouri River Railroad in Nebraska,' and in parenthesis under it, 'Chicago, Burlington and Quincy Railroad Company, owners.' "

The Chicago, Burlington and Quincy Railroad Company being, at the time of the fire, the owner and operator of the railroad on the line of which the fire originated, whatever responsibility for the fire and its results there may be attaches solely to that corporation and, because it was from its train and from no other train that the fire proceeded and it and not another is liable for the loss, it is insisted that the judgment against the Burlington and Missouri River Railroad in Nebraska cannot stand. If the defendant were a corporation distinct from the Chicago, Burlington and Quincy Railroad Company we might be compelled to agree with counsel.

See *D. & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381.

But the fact is not so. It appears abundantly from the evidence produced for the defendant that the Burlington and Missouri River Railroad Company in Nebraska is not the legal name of any corporation, but that, for its own convenience, the Chi-

cago, Burlington and Quincy Railroad Company has designated that portion of its line west of the Missouri river as the Burlington and Missouri River Railroad in Nebraska. The purpose of this suit was to obtain a judgment against the owner of the line of railroad from which the fire proceeded, but the owner was misnamed. Instead of being sued by its proper corporate appellation it was called by a name derived from a designation which it applied to a particular portion of its line. The summons in the case was served on the agent of the Chicago, Burlington and Quincy Railroad Company and in response to its notification that company appeared and conducted the defense. As a legal entity the Burlington and Missouri River Railroad Company in Nebraska had no existence; summons could not be served on it; it had no agents; it could not employ counsel; and it could not make a defense. But the summons brought a party into court by which defense was made, and evidently that party was the Chicago, Burlington and Quincy Railroad Company, upon whose agent summons was served. The simple fact which the record clearly discloses is that the Chicago, Burlington and Quincy Railroad Company was sued by an erroneous name.

It was competent to that company to submit to a suit against it by that name. It could have taken advantage of the error upon its appearance in response to the summons, but it offered no objection, and participated in a trial of the case upon its merits. It therefore waived the error in its name. Its failure to show the misnomer at the proper time concludes it, and if the plaintiff move properly the judgment is as effective against it as if it had been correctly named.—*Ins. Co. v. French*, 18 How. 404; *Pond v. Ennis*, 69 Ill. 341.

Error is assigned upon the admission and ex-

clusion of evidence. It is not shown in argument how the defendant was injured by the rulings. In some instances they seem to have been proper enough; in others the evidence rejected was afterwards received, and it is upon that very evidence that this opinion largely rests. Two examples will serve to show the nature of the rulings of which complaint is made. The plaintiff was asked by his counsel whether or not in the enclosure where the hay was stacked and on the ground where it was cut there were small trees growing. The answer was that there were small trees between the stack and the railroad. It was objected by the defendant that the question was immaterial, incompetent and irrelevant. The question does not seem to us to be very important. It probably belongs to a class of questions not infrequently asked witnesses for the purpose of obtaining an acquaintance with the situation or circumstances related to the occurrence out of which the litigation arose. Such acquaintance may lead to a clearer understanding of the principal facts, or it may not; but how it can be harmful is not explained to us. The plaintiff claimed nothing on account of the trees; there was no evidence that any of them were injured; and except as descriptive of the ground through which the fire passed on its way to the stack, nothing was said about them. We hardly think the court erred in allowing the question. John A. Webber was a witness for the defendant. He testified that he was an agent for the company whose track passed through the plaintiff's farm. He was then asked "What company is that?" The plaintiff objected to the question as not being cross-examination, and the objection was sustained. The question was proper, and the answer should have been received. But the defendant was allowed by other witnesses to prove what company that was and the evi-

dence was uncontradicted, so that it had the full benefit of the fact it desired to establish and was, therefore, unharmed by the particular ruling.

Complaint is made of an instruction to the effect that if the defendant appeared and defended the suit and appealed from the judgment of the justice to the county court it was estopped to deny its corporate existence. That instruction states the law.—*Decorating Co. v. Ham*, 3 Colo. App. 559. As the defendant was the Chicago, Burlington and Quincy Railroad Company sued by a wrong name, it was its corporate existence to which the instruction referred. We see no necessity for the instruction, but neither do we see how the defendant could be injured by it. The instructions offered by the defendant which the court declined to give advanced propositions directly opposite to views expressed by us in this opinion, and were properly refused. Some of the instructions for the plaintiff were too favorable to the defendant; but that they were so furnishes the defendant with no ground of complaint.

The judgment will be affirmed.

Affirmed.

[No. 2119.]

FALKE ET AL. V. BRULE ET AL.

1. Sales—Chattel Mortgages—Bills and Notes.

Plaintiffs agreed with their debtor to purchase his stock of goods and gave him their promissory note for the amount of the agreed purchase price over and above his debt to them and took from him a bill of sale. On the same day another creditor attached the goods and plaintiffs and the debtor made another agreement whereby they abandoned the sale and plaintiffs paid off the attachment claim and added it to their own claim, and took the debtor's note and a chattel mortgage on the goods to secure it. The debtor agreed to return plaintiffs' note, but failed to do so, and indorsed it to defendants who had full knowledge of the transaction between plaintiffs and the debtor. Defendants transferred the note before maturity to an innocent purchaser,

and plaintiffs were compelled to pay the note. Held, that plaintiffs and the debtor had a right to abandon their agreement of sale and substitute therefor the chattel mortgage. That the entire proceeding constituted but one transaction and a formal resale from plaintiffs to the debtor was not necessary. That plaintiffs' note indorsed to defendants was without consideration and defendants were liable to plaintiffs for the amount plaintiffs were required to pay thereon.

2. Appellate Practice—Assignment of Errors—Abandonment.

Assignments of error not argued or presented in appellants' brief will be treated as having been abandoned.

Appeal from the District Court of Arapahoe County.

Mr. L. E. C. HINCKLEY, for appellants.

Mr. JOHN T. BOTTOM and Mr. F. A. WILLIAMS,
for appellees.

WILSON, P. J.

H. Buddendick, a merchant, was indebted to plaintiffs, appellees herein, in the sum of three hundred dollars. In order to make settlement Buddendick sold to plaintiffs his entire stock of goods, fixtures, etc., estimated to be worth about nine hundred dollars, the consideration being this debt of three hundred dollars and the sum of four hundred dollars to be paid to him by plaintiffs for which amount plaintiffs executed and delivered to Buddendick two promissory notes payable three months after date. The sale was evidenced by a memorandum in writing, and plaintiffs took actual and full possession of the stock. On the same day and within a few hours thereafter at the instance of Plummer & Co., another creditor of Buddendick, a portion of the stock was seized and levied upon under a writ of attachment. Thereupon and on the same day plaintiffs and Buddendick after consultation with a lawyer concluded that it would be advisable to abandon the sale and that in lieu thereof Buddendick would execute to

plaintiffs a note covering the amount of his indebtedness to them, and also the amount of the Plummer claim, and costs of suit, which plaintiffs agreed to assume and discharge, and execute a chattel mortgage upon the stock of goods to secure payment of this note. This plan was carried into effect immediately. Buddendick executed his note to plaintiffs for \$500, being the amount of the Plummer and plaintiffs' claims, and contemporaneously executed the chattel mortgage to secure it. It was a part of this agreement that Buddendick should return the two notes for four hundred dollars which had been given to him in the morning. This he failed to do at the time of the execution of the mortgage, stating that he had left the notes at home but that he would get them and deliver them to plaintiffs. This he also wholly failed to do, and subsequently on the same evening or the next morning assigned them to defendant, The Falke Mercantile Company, another creditor, who at the time it was claimed by plaintiffs, had full knowledge of the infirmity which attached to the notes and of the entire transaction between plaintiffs and Buddendick. The defendant company on the next day, it is charged, assigned these notes to a third party, who by reason of being an innocent purchaser before maturity, prevailed in a suit upon the notes and compelled payment by plaintiffs. This suit is brought by plaintiffs to recover from the Falke company the amount which they were thus compelled to pay, on the ground that the assignment was made by it with full knowledge of the payment and invalidity of the notes.

The main contention of defendants is that the notes for four hundred dollars were not paid, and that the promise on Buddendick's part if any to give them back was wholly without consideration, and not enforceable against him. This is based upon the

claim by defendants that the property having passed to plaintiffs by virtue of the sale and the sale being complete it was necessary that the title should re-pass to Buddendick so as to give a basis for the chattel mortgage claimed to have been substituted for the bill of sale. In other words, counsel urge that Buddendick was never reinvested with the title to the property, and that hence the chattel mortgage was void and of no effect because of this want of title at the time of its execution. We see no force in this contention. In fact the entire proceeding on the day between Buddendick and plaintiffs was one transaction. The one purpose and object of all was the satisfaction of the debt to plaintiffs. The chattel mortgage agreement was but a substitution for the agreement of sale. They had a perfect right to abandon the latter and substitute the former; indeed, they might have subsequently, if they had desired, abandoned the latter and reaffirmed the former. No formality of a written reconveyance and an actual and visible retaking of possession was required, because such if necessary was understood between the parties, and their assent would be implied from their acts, and nobody could complain except a party whose rights might have intervened. There were no intervening rights, however, except the Plummer claim, and that was gotten out of the way through means of its payment by plaintiffs. We cannot see where the statute of frauds has any application at all to the transactions between Buddendick and plaintiffs, whether they be considered as only one or several. They started out to make a sale but concluded to abandon it. How defendants were prejudiced we cannot conceive. Everything was complete and fully consummated before the defendant company attempted to assert any right. Buddendick had an undisputed legal right to prefer plaintiffs as creditors.

That there was a full and *bona fide* consideration for the five hundred dollar note, payment of which was secured by the chattel mortgage, is not questioned and there is nothing connected with the entire transaction which discloses in our opinion the slightest taint of fraud, actual or legal, upon other creditors of Buddendick.

This is the main and only question argued by counsel in his brief, and in the court holding adversely to defendants upon it we see no error. Whether defendant at the time it secured the notes from Buddendick had full notice and knowledge of the transaction between him and plaintiffs and of the satisfaction of the notes in the manner charged was a question of fact upon which the finding of the court was adverse to it, and it being sustained by the evidence this court is concluded by it.

Defendants assigned a number of errors based upon the admission of incompetent, and the rejection of competent, evidence. Counsel have not seen fit, however, to argue these assignments, not even presenting them in the briefs, and for this reason they will be treated as having been abandoned and requiring no notice.

The judgment will be affirmed.

Affirmed.

[No. 2111.]

WILLIAMS V. BISHOP ET AL.

1. Principal and Agent—Commissions—Quantum Meruit.

In an action by a real estate agent for commission where he sues for the reasonable value of his services, it is immaterial whether or not there was an agreement as to the amount of the commission.

2. Same—Evidence.

In an action by a real estate agent for commission where the evidence showed that he was entitled to commission, and he

testified that his services were worth a certain sum, and his evidence as to value was uncontradicted, he was entitled to judgment for that amount.

3. Same.

Evidence examined and held sufficient to entitle a real estate agent to commission on a sale of property.

4. Appellate Practice—Directing Judgment.

Where a cause has been twice tried without material change of the evidence and each time the evidence showed plaintiff to be entitled to a judgment for a certain sum, and there is no reason to believe that there would be any material change in the evidence at another trial, the judgment of the lower court for defendant will be reversed and judgment for plaintiff directed.

Appeal from the District Court of Las Animas County.

Mr. W. B. MORGAN, for appellant.

Mr. A. J. ABBOTT and Mr. JAS. McKEOUGH, Jr.,
for appellees.

THOMSON, J.

This case is before us for the second time. The result of the former investigation was the reversal of a judgment against the present appellant.—*Williams v. Bishop*, 11 Colo. App. 378.

The last trial brought him no better fortune than the first, and it is to be ascertained whether the new evidence presented such change in the situation as to make good a judgment which before was erroneous.

Recovery was sought for services rendered in finding a purchaser for certain real estate; the plaintiff in his complaint placing the value of such services at \$115. At the first trial as appears from the opinion the witnesses on both sides testified to substantially the following facts: The plaintiff Williams was a real estate agent in the city of Trinidad; the defendants, George H. Bishop and M. B. Munroe, were the owners of certain real estate in that city consisting of a lot with a dwelling house on it; C. M.

Bishop was a brother of George H. Bishop, and had charge of his interest in the property as his agent; W. F. Munroe was the husband of M. B. Munroe and acted for her in relation to her interest; M. B. Munroe had conveyed her interest to E. L. Blake as security for a debt she owed him; C. H. Blake was a brother of E. L. Blake, and in some of the transactions affecting the property acted for him; C. M. Bishop as agent for George H. Bishop, and W. F. Munroe as agent for M. B. Munroe placed the property with the plaintiff for sale at \$2,500, his commission to be deducted from the purchase price; those men were at the time informed by the plaintiff that he was in correspondence with a lady who was desirous of purchasing real estate there and to whom he would show this property; the lady was Mrs. Waldron who lived out of the city. Shortly after the property had been placed with the plaintiff Mrs. Waldron, by prearrangement with him, came to his office and stated that she was ready to purchase; he took her to this property and showed her through the house. He informed her that the price was \$2,500. She expressed herself as much pleased with the property and took a few days to consider the proposition. Shortly afterwards in company with C. H. Blake she was looking at different properties in the city, and happening to pass this particular property she called his attention to it saying that it was a pretty place for a residence and that the plaintiff had showed it to her and offered it to her for \$2,500. Blake replied that he thought he could let her have it for less money and took her to the owners' representatives, who sold it to her for \$2,300. Before they made the sale Blake told them what Mrs. Waldron had said in relation to the plaintiff's offer of the property to her. Upon the foregoing facts we held the plaintiff entitled to a commission, and reversed the judgment

denying it, and if this judgment was rendered upon substantially the same evidence that appeared in the former record it cannot stand.

But it is insisted for the defendants that there was such change in testimony and such additional evidence as warranted the judgment. After a few words concerning an episode of the trial we shall look into the claim.

W. F. Munroe was a witness for the defendants. He had testified that the transaction between M. B. Munroe and E. L. Blake was a sale, and that the deed conveyed an absolute title. In the course of his cross-examination by plaintiff's counsel he was asked this question:

"Isn't it a fact that your efforts to testify contrary to the fact that that deed was a mortgage is for the purpose of showing that somebody else owned this property besides your wife in order to avoid a judgment against her?"

To this he answered:

"I would not say that. I am a pretty good liar myself."

The testimony of a witness who while testifying boasts that he is a liar is entitled to no consideration and will receive none here.

Counsel say that the testimony last given concerning the price at which the plaintiff was authorized to sell the property differs from that produced at the former trial, and that the plaintiff's statement that the price was \$2,500 was squarely contradicted. The only witness for the defendants aside from W. F. Munroe who spoke on the subject was C. M. Bishop. The following is what he said:

"I heard Williams' testimony. I never told him he could take the property for \$2,500 and take 5 per cent. commission. I met him in his office and told him he could have all he could get above \$2,300."

The testimony of the plaintiff was that originally the property was placed with him by C. M. Bishop at \$2,300; that he did not know at the time that Munroe had any interest in it; that shortly afterwards in Bishop's absence Munroe accosted him, asserting ownership and saying that he would not take for his interest what Bishop wanted, and that the two men were then joined by Bishop, and after some conversation it was agreed among them that the plaintiff should sell the property for \$2,500. In the course of his testimony the plaintiff also said it was agreed that he should have a commission of five per cent. Except as to the matter of commission we find no contradiction between the plaintiff and Bishop. They both mentioned \$2,300 as a price for which the property might be sold. The plaintiff said the price was afterwards changed, and Bishop did not say it was not. Bishop did not deny that the selling price was finally fixed at \$2,500. What he denied was that the plaintiff was authorized to sell for \$2,500 and take 5 per cent. commission. That the price was \$2,500, but that there was no agreement as to amount of commission is entirely consistent with his testimony. The plaintiff's suit is not upon a contract, but for the reasonable value of his services, and it is immaterial whether there was an agreed commission or not. As to the price which the plaintiff might ask for the property the witnesses were in harmony.

The following is what Mrs. Waldron said:

"Mr. Williams and I had been in correspondence and he showed me the property about a week or just a few days before the price was agreed upon. When we got over to the house I looked it over and thought it was very nice and pleasant, and as we left the house I asked him what price it could be bought for. He said \$2,500. As far as liking the house is concerned I expressed it in very plain English that it

was a very nice little house and that I liked the property but the price was more than I could agree to pay for it. He took me down to the hotel and I said I would come down again. Of course I cannot remember the exact conversation. The same afternoon Mr. Blake took me out to see the same property and to look at some lots, and some houses he had built. I mentioned to him that Mr. Williams had shown me a house when we were on the street below. I told him: 'That house there Mr. Williams had shown it to me for sale. It is a very nice place.' He said: 'I built that house. Would you like to see it?' I said no, I have seen it, but he could drive me up there if he liked, and so he did. I paid \$2,300 for the property. * * * I had seen Mr. C. H. Blake in Catskill, and came down more to have him show me in regard to property he could build. Not that exactly, but to see what I could do. At that time Mr. Williams showed me this property and it was only three days elapsed from that time until I came down and purchased the house. I declined to purchase the property at first on account of the price given me by Mr. Williams, and I would not under any circumstances have reconsidered that proposition at the time I came down again."

Before her purchase Mrs. Waldron lived at a place called Catskill, and came down from that place to Trinidad. The construction which counsel give her statements would make them inconsistent with her former testimony. We do not think her language demands such construction or that what she said on the two occasions necessarily involves contradiction. Her remark to the plaintiff that the price was more than she could agree to pay is simply illustrative of the usual disposition of a buyer to purchase at as low a figure as possible, and that it was not intended to be final is indicated by the fact that when she left

the plaintiff she told him she would come again. It is true she afterwards said that she would not, under any circumstances, have reconsidered the remark; but she also said it was at the time she came down again that she determined against reconsideration. Before she "came down again," namely, on the same day in the afternoon of her talk with the plaintiff she was offered the property for \$2,300. That she should upon reflection resolve not to reconsider her statement and determine not to pay the plaintiff's price is hardly surprising; but the conduct of the defendants supplied the reason for her resolution, and they have disabled themselves to say that without interference by them she would not have purchased from the plaintiff. The plaintiff testified that when he made her the offer she took time to consider it. Her statements were, to say the least, not inconsistent with his testimony, and contained nothing which would influence us to change the views we expressed in our former opinion.

We are told by counsel that there was no evidence that either W. F. Munroe or C. M. Bishop had any authority to contract for the sale of this property through the plaintiff. We do not understand this statement. The direct and unchallenged testimony of witnesses competent to speak on the subject was that when the property was placed with the plaintiff W. F. Munroe was representing the interest of M. B. Munroe, and C. M. Bishop the interest of George H. Bishop.

Finally, it is said that at the time the property was left with the plaintiff M. B. Munroe had no interest in it, having previously sold and conveyed her interest to Blake, who never authorized the plaintiff to sell it. Blake testified as follows:

"I told Munroe if I could sell the house for more than he deeded it to me at, I would give him the

benefit of it. The benefit was to apply on his indebtedness to me. * * * I testified in my former testimony that I had a loan on the property."

The following then occurred:

"Q. Isn't it a fact that that deed was held as security for an indebtedness that Mrs. Munroe owed you?

"A. It is not.

"Q. Why did you testify to that effect in the former trial?

"A. Because it answers the same thing."

It is evident from the foregoing that the deed was given as security for a debt; that it was therefore a mortgage and that Blake's assent to the authority given the plaintiff was unnecessary. And the conduct of all the parties including Blake himself with reference to the property and its sale is inconsistent with any other hypothesis.

The foregoing are the only instances of change in testimony, or of new testimony, to which our attention has been directed. It is true that the evidence deviated in several particulars from that on which our former decision was based, but the differences were unimportant. As to the authority given the plaintiff—what, to the defendants' knowledge before selling to Mrs. Waldron, he did under it—and the conduct of the defendants in forestalling him, we have here substantially the same case that we passed upon before. The defendants introduced no testimony which is not susceptible of legitimate explanation harmonizing it with the plaintiff's statements. The plaintiff testified that his services were reasonably worth the sum named in his complaint, and there was no evidence to the contrary.

The case has been tried twice, and we have no reason to believe that at another trial there would be any material change in the evidence. The judg-

ment will therefore be reversed, with direction to the trial court to enter judgment in the plaintiff's favor for \$115.

Reversed.

GUNTER, J., not participating.

[No. 1705.]

FORSYTH V. RYAN.

1. **Choses in Action—Assignment—Parties.**

The assignee of a chose in action may maintain suit thereon in his own name before a justice of the peace.

2. **Same—Evidence.**

An assignment of a debt may be by parol and may be inferred from the acts and conduct of the party.

3. **Assignment of Debt—Consideration.**

In an action by the assignee of a debt it is immaterial to defendant whether or not there was any consideration for the assignment.

4. **Same.**

In an action by the assignee of a debt the fact that the assignee had agreed to pay a board bill of the assignor with the money if collected could not defeat a recovery by the assignee.

Appeal from the County Court of Las Animas County.

Mr. A. J. ABBOTT and Mr. A. F. HOLLENBECK, for appellant.

Mr. W. B. MORGAN, for appellee.

WILSON, P. J.

This suit was an action in debt, begun before a justice of the peace, and hence we can ascertain the nature of the controversy and the issues only from the evidence presented. It appears that defendant Forsyth entered into a written contract with the plaintiff, Frank Lynch and James Ryan, Jr., whereby he agreed to pay to the latter a certain sum per ton for all castings made by them at his foundry, he agreeing to furnish certain tools, patterns, etc. The con-

tract was to continue for a period of four months. Before its expiration it is claimed that there was a breach of contract by the defendant, and that the same was abandoned. Thereafter, this plaintiff electing to sue upon a *quantum meruit*, began this suit to recover the amount alleged to be due for the foundry work done by all three of the parties, claiming an assignment by Lynch and Ryan, Jr., of the debt, or that portion of it due to them respectively.

It is alleged that an assignee of a chose in action cannot maintain an action before a justice of the peace in his own name. There is no need to consider or discuss the reasons urged by counsel, because this question has been settled by the supreme court, adversely to this contention.—*Layton v. Kirkendall*, 20 Colo. 238.

Whether there was an assignment was a question of fact which was affirmatively settled by the verdict of the jury upon conflicting evidence, and there being sufficient to sustain the finding, it is conclusive upon this court. An assignment of a debt may be by parol, and may be inferred from the acts and conduct of the party.—*Chamberlin v. Gilman*, 10 Colo. 100.

It is claimed that the alleged assignment was not proved, because no consideration was shown. This contention cannot be upheld. If the defendant owed the debt, payment to the assignee would discharge it, and it is immaterial, as between the assignor and the assignee, what the consideration was, or whether there was any.—*Reduction Co. v. Johnson*, 10 Colo. App. 139.

It appearing in evidence that the plaintiff was to pay a board bill due by Lynch in case he collected the money from defendant due to Lynch, it is insisted that this shows that the claim was still under the control of Lynch, and that there was no actual assign-

ment. This contention is also untenable. It has been expressly determined otherwise by this court. The agreement between plaintiff and Lynch concerning the disposition of the proceeds did not defeat the recovery.—*Gomer v. Stockdale*, 5 Colo. App. 492.

This disposes of all the legal questions which require notice. All other issues were questions of fact, which the jury determined against the defendant, and for the reasons above stated their findings will not be disturbed by this court.

The judgment will be affirmed. *Affirmed.*

GUNTER, J., not sitting.

[No. 2109.]

THE FARMERS' ALLIANCE MUTUAL FIRE INSURANCE
COMPANY V. TROMBLY.

17	513
308	217

1. Fire Insurance—Limitation.

The fact that an action on a fire insurance policy was not commenced within the time limited by the policy and by-laws of the company within which such action might be commenced would not defeat the action if the plaintiff was induced to delay the commencement of the action by demands of the defendant for further statement and information concerning the loss, and by continual promises of adjustment.

2. Fire Insurance—Loss—Evidence.

Evidence discussed and held sufficient to sustain a judgment in an action upon a policy of fire insurance for loss by fire.

3. Appellate Practice—Evidence—Credibility of Witnesses.

The question of the relative credibility of witnesses is settled by the verdict of the jury and will not be considered by the appellate court.

Appeal from the District Court of El Paso County.

Mr. J. WARNER MILLS, for appellant.

Mr. GEORGE H. KOHN, for appellee.

THOMSON, J.

Suit upon a policy issued by the appellant, insuring household furniture of the appellee against loss by fire. The plaintiff had judgment, and the defendant appealed.

The complaint, after stating the contract of insurance, alleged that on the 20th day of July, while the policy was in force, the building containing the property insured which the complaint described, together with the property it contained, was totally destroyed by fire; that the defendant was immediately notified of the loss; that the proofs required by the policy were furnished; and that all of its conditions were satisfied.

The answer denied that there ever were, belonging to the plaintiff, goods of the kind, quantity and value, mentioned in the policy, and alleged to have been destroyed by fire. It also set forth its by-law No. 27, which was incorporated into the policy as one of its conditions, and which provided that no suit or action against the defendant company for any loss, should be sustained unless commenced within ninety days after the occurrence of the loss. The answer contained other allegations, but the limitations of the argument render their statement here unnecessary.

The replication averred that the plaintiff was induced to delay bringing her action until after the lapse of the time limited in the policy for the commencement of suit, by demands from the defendant throughout the ninety days for further statement and information concerning her loss, all of which she furnished, and by its continual promises of adjustment.

It is insisted for the defendant that the verdict was not warranted by the evidence. Counsel recognizes the rule in accordance with which, when there is a conflict between the statements of witnesses, an

appellate court holds itself bound by the verdict of the jury, if the evidence was properly submitted; but he says that upon the question whether the goods insured were in the building described in the complaint at the time of the fire, there was no substantial conflict, and that it convincingly appeared from the testimony that a large portion of the property had been removed before the breaking out of the fire. To determine the correctness of counsel's statement, we must go to the evidence. The witnesses called by the defendant, who were present at the fire, stated that when the firemen with their hooks pulled down the wall of one side of the building—a small one story frame house—they could see the interior, and that but few articles were there; that those enumerated by the plaintiff in her statement to the company, could not have been there; and that the ruins disclosed no evidence of the presence of articles which, on account of material entering into their construction or composition, could not have been totally destroyed. Other witnesses, residing in the vicinity of the building, testified to the removal of a large quantity of furniture from it shortly before the fire. For the plaintiff a Mr. Sprague testified that he took the furniture in question from a house occupied by the plaintiff to the building which was destroyed, to be stored there; that he packed it closely; that he slept in that building at night for a week or ten days afterwards; that subsequently a Mr. Graff lodged there; that on the day of the fire, or the day before, he hauled some chairs and blankets to the building, the plaintiff accompanying him; that he was inside of the building and noticed no change in appearances, although he did not look closely. The plaintiff, on her direct examination, testified that the goods remained constantly in the building until the fire; and, on cross-examination, said that she was in the building on the

day of the fire, and that the appearance of things was the same as when the furniture was placed there; and that there was no article taken out of the house between the time it received the goods, and the time of the fire, with her consent. The foregoing embraces the whole testimony affecting the question of removal of the goods. Upon this question there was abundant evidence to warrant a verdict for the defendant; but we are unable to say that there was such absence of opposing proof as to justify us in interfering with the jury's finding. Two witnesses testified that they saw the furniture immediately before the fire, and that it then had no appearance of having been disturbed. If such a removal as defendant's witnesses described had taken place, the fact would have been instantly noticeable; so that the testimony for the plaintiff was contradictory of that given for the defendant. It is in such a case that the jury's opinion controls ours.

It is to the question of the sufficiency of the evidence to sustain the verdict, that the learned counsel of the defendant directs nearly his entire argument. The reasoning by which he undertakes to show the superior credit to which his own witnesses are entitled, comes too late. The question of credibility was irrevocably settled by the jury.

It is complained that one item of testimony offered for the defendant was excluded. The witness was a Mrs. Harper, and we quote in full the paragraph containing the excluded statement, as it appears in the plaintiff's abstract:

"There was a man with her, medium size, light mustache, light hair, gray clothes, light hat; they were there every day for about three weeks before the fire; have seen them go around the building; that was about a week before the fire; yes, was at my house night of fire; had notice of the fire; the man

seen with the plaintiff knocked at my door, between 10 and 11 o'clock; he asked us to get up and let him get a bucket of water, that his house was on fire. What did he say? He asked us to get up and let him get a bucket of water, that his house was on fire. I opened the door and he came in and went through the room. He said a lamp had exploded and set fire to the house."

It was the witness's version of what the man said, that, on motion of the plaintiff, was stricken out. We do not think there was any error in the ruling. Counsel says that the man's statement was part of the *res gestae*. We hardly think it should be so regarded. Nevertheless, in itself, without some explanatory facts, it was immaterial. It may be conceded that the man referred to the plaintiff's building, although he did not say so; but he attributed the fire to the explosion of a lamp. The accidental explosion of a lamp, as the cause of a fire, would not, ordinarily, relieve the insurer from liability. But even if the burning lamp was broken for the express purpose of setting fire to the building, there is nothing in the man's statement, or in the evidence anywhere, to connect the plaintiff in any way with the act. The fact that a man burned down her house, constitutes no defense unless it be shown that she was in some degree accessory to the deed. We find nothing further in the abstract or argument which calls for the expression of an opinion.

Let the judgment be affirmed. *Affirmed.*

[No. 2110.]

THE FARMERS' ALLIANCE MUTUAL FIRE INSURANCE
COMPANY V. STEWART.

Appellate Practice—Evidence—Verdict—Fire Insurance.

In an action on a policy of fire insurance for loss by fire where the jury returned a verdict for plaintiff upon conflicting

evidence submitted to them under proper instructions and there is sufficient evidence to support the verdict, it will not be reversed on the ground that it is against the weight of evidence on defendant's plea that the fire was caused by the wilful act of plaintiff.

Appeal from the District Court of Chaffee County.

MR. J. WARNER MILLS, for appellant.

MR. A. L. TAYLOR, for appellee.

WILSON, P. J.

Plaintiff Stewart sought by this suit to recover the loss by the burning of a small stock of goods, fixtures, etc., owned by him, and which was covered by a policy of insurance issued by the defendant company. Trial was to a jury, which found in favor of plaintiff, and assessed his damages at \$176.66. Judgment was rendered accordingly, after a motion for a new trial had been interposed and denied. A reversal is asked on the alleged ground that the verdict was against the weight of the evidence, on the plea of defendant that the fire was caused by the wilful act of plaintiff. This was a question of fact solely, and was submitted to the jury under clear and proper instructions. The evidence was to some extent conflicting, but there was ample to support the verdict, and under these circumstances this court is bound by the rule, well settled and repeatedly announced, that we are concluded by the verdict. The wisdom and importance of this rule are emphasized by this case. Both the members of the jury who rendered the verdict and the judge who denied the motion for new trial, had the benefit of seeing and hearing testify each of the witnesses, by which means only could one intelligently determine to whom to give credence. There is submitted to us only the written testimony, without the advantage of seeing

the witness in person, and his manner and conduct on the witness stand, which are always the most valuable guide and efficient aid in forming an opinion as to the truthfulness of a statement by a witness. A finding by this court reversing that of the jury and of the judge who had these superior advantages for determining the question, would be practically a finding fixing upon the plaintiff the stigma at least of the crime of arson, either as principal or accessory. Such a proceeding would be manifestly unreasonable and unjust. Besides, we are frank to say that after reading the evidence preserved in the abstract, the weight of the evidence decidedly favored the verdict of the jury. The matter chiefly relied upon to sustain the contention that the fire was caused by plaintiff himself, or by his direction, was not inconsistent with his entire innocence.

It is complained that "the result of the trial in the lower court was a compromise verdict." Counsel content themselves simply with this suggestion, and do not point out anything in the record upon which such a conclusion could be based; nor are we told why there should be a reversal for this reason, even if it were true.

There were several other assignments of error, but they are not discussed in the briefs, and we do not therefore feel called upon to notice them. So far as we can see, there was no prejudicial error. The judgment was sustained by both the law and the evidence, and it will be affirmed. *Affirmed.*

[No. 2613.]

**THE BOARD OF COUNTY COMMISSIONERS OF PROWERS
COUNTY V. THE PEOPLE OF THE STATE OF COLORADO.**

Taxes and Taxation—Interest and Penalties.

Interest and penalties collected on delinquent state tax belong to the state. Where such interest and penalties on delin-

quent state tax have been collected by a county treasurer and retained by the county, an action may be maintained by the state against the county to recover such interest and penalties.

Appeal from the District Court of Prowers County.

Mr. J. K. DOUGHTY and Messrs. ALLEN & WEBSTER, for appellant.

Mr. CHARLES C. POST, attorney general, for appellee.

Mr. DAN B. CAREY, of counsel.

GUNTER, J.

The state and county each claims herein the interest collected upon taxes levied for state purposes. The state had judgment below.

Our law, constitutional and statutory, requires the levying of a tax for state use.—Mills' Ann. Stats., vol. 1, sec. 437, vol. 3, sec. 446; Colorado Constitution, art. 1, sec. 11; Mills' Ann. Stats., vol. 2, secs. 3768, 3851.

This tax the county clerk is required to compute and carry out in a separate column on the tax list.—Mills' Ann. Stats., vol. 2, secs. 3828, 3851, 3852.

The county authorities are required to collect this tax, and all the expense of collection is expressly provided for.—Sections of our Revenue Act.

This tax is sacred to the use for which levied, that is, for the state.—Mills' Ann. Stats., vol. 3, sec. 3768; *Hockaday v. County Commissioners*, 1 Colo. App. 362, 29 Pac. 287; *Forbes v. Grand County*, 23 Colo. 344, 47 Pac. 388.

Monthly, as rapidly as collected, the county is required to pay this tax to the state.—Mills' Ann. Stats., vol. 2, secs. 3852, 3867.

As this tax is levied for the state, can be used for no other purpose; as the county authorities are

required to collect and transmit it to the state as rapidly as collected, its ownership is in the state.

The statute prescribes when this tax becomes delinquent, and the rate of interest the taxpayer is liable for thereon during delinquency.

By the failure to pay the tax when due, the state is deprived for a time of its revenue, and by such default subjected to inconvenience and loss. It is reasonable that the legislature in requiring the taxpayer to pay interest on the tax he owes the state after it is past due, intended to make compensation thereby to the state for loss of use of its funds. Such purpose is realized by awarding the interest in controversy to the state.

As the state owns the tax withheld, as it suffers the loss and inconvenience through its being in default, as our statute makes no express disposition of the interest accruing during the delinquency, we think it reasonable, just and in accordance with the legislative intent that the interest should follow, and does follow, the tax, that is, go to the state. Such conclusion is sustained by authorities.

In applying the law to conditions similar to those here presented the court in *State of Nevada v. Hufaker*, 11 Nev. 300, 303, said:

"We think the penalty is to be regarded not only as a punishment to the delinquent, but also, and principally as a compensation to the state and county for the delay of payment and the consequent derangement to their finances. So regarded, the obvious conclusion is, that the penalty follows the tax, in this case five-thirteenths to the state and eight-thirteenths to the county."

In *People v. Reis*, 76 Calif. 269, upon facts in principle the same as here, the court said:

"If the tax remains finally delinquent * * * it may possibly be subsequently collected in some

other method provided by law, in which event the interest is to be added to compensate for the long delay, and as an incentive to the taxpayer to make a voluntary payment, and thus stop the interest. *

* * And as this interest is not required by the statute to be collected for the use of the county, or city and county, it is reasonable to hold that that portion of the interest accrued and collected on the state tax should be paid to the state and go into its treasury."—*Tacoma School District v. Hedges*, 13 Wash. 69; *Board v. State*, 119 Ind. 473.

Judgment affirmed.

Affirmed.

17 622
117 626

[No. 2587.]

DUNCAN V. THOMAS, A LUNATIC, BY LINDSEY AS HIS
CONSERVATOR.

1. **Apellate Practice—Bill of Exceptions—Change of Venue.**

An assignment of error to a ruling of the court denying an application for change of venue will not be considered where the facts upon which it was based are not within the bill of exceptions.

2. **Appeal Bonds—Action Upon—Concurrent Remedies—Election.**

Where a cause was appealed from the county court to the district court and affirmed, and an appeal was taken from the judgment of the district court to the supreme court where it was affirmed, actions may be maintained upon both appeal bonds limited, however, to one satisfaction, and it was not error to refuse to require the obligee of the bonds to elect between actions pending upon the two bonds.

3. **Lunatics—Conservators—Judgments—Contempts—Appeal Bonds—Satisfaction.**

Where a judgment was rendered against a conservator of the estate of a lunatic in favor of the estate, from which he appealed and the judgment was affirmed, and the conservator was committed for contempt for failure to pay such judgment and confined in county jail, his commitment did not operate to satisfy his obligation nor that of his sureties on his appeal bond.

4. Appeal Bonds—Estate of Lunatic—Conservator.

Where objections were filed to the report of a conservator of the estate of a lunatic, and judgment was rendered in favor of the estate against the conservator from which he appealed, giving an appeal bond running to the estate of the lunatic, after having the benefit of the appeal which was decided against him, the conservator is estopped to question the validity of the appeal bond for want of an obligee therein.

Appeal from the District Court of Arapahoe County.

MESSRS. DUNCAN & ANDREWS, for appellant.

MR. H. S. VAUGHN, for appellee.

GUNTER, J.

During the administration of the estate of a lunatic in the county court of said county exceptions were filed to the report of the conservator, and on a hearing thereon, judgment went in favor of the estate and against the conservator in a certain amount. On appeal therefrom to the district court there was an affirmance, and on appeal from the district court to the supreme court the judgment of the district court was modified and affirmed. In pursuance of a remittitur from the supreme court the district court entered the judgment as modified and ordered that the original papers together with the modified judgment be certified to the county court for further proceedings to enforce the collection of the judgment. The county court entered up judgment as modified and ordered the conservator to pay the amount of such modified judgment into that court. Later the conservator was ordered committed for contempt for failure to pay into court the sum adjudged against him. He remained confined in the county jail from July until the following May, when the court being satisfied that he was without means to discharge the judgment ordered his release.

The present action is upon the appeal bond given in the appeal from the district to the supreme court,

and was instituted in October following the July of the conservator's commitment. About the same time suit was instituted upon the appeal bond given in the appeal from the county to the district court.

In the present action the bond was introduced; affirmance of the judgment therein mentioned shown and nonpayment of the judgment named in the condition of the bond. Judgment was for plaintiff, and therefrom is this appeal by a surety upon the bond.

Appellant contends:

1. That the court below erred in denying his application for a change of venue.

A sufficient reason for declining to consider this question is, the facts upon which it is based are not within the bill of exceptions.

2. That the trial court erred in refusing to require plaintiff to elect between the actions pending upon above mentioned appeal bonds.

The two bonds were in force and securities for the affirmed judgment.—*Wyman v. Felker*, 18 Colo. 382, 33 Pac. 157.

There is no reason why plaintiff could not pursue remedies on the two bonds simultaneously within the limitation of one satisfaction.

3. That the imprisonment of the conservator worked a satisfaction of the bond.

It is unnecessary to consider the question whether the imprisonment of the conservator was legal or illegal—it did not operate to satisfy the obligation of the conservator or his bondsmen herein.

4. That the bond sued on is void through want of an obligee therein.

As stated above, in a hearing had upon the report of the conservator of a lunatic, it was adjudged that he pay a definite sum to the estate. In effecting an appeal from such judgment the bond in suit was given. It recites that the conservator and bondsmen

are bound unto the estate of the lunatic in a certain sum, and recites as a condition of the bond the recovery of the judgment ordering the conservator to pay over to the estate a certain sum; that an appeal has been taken therefrom, and that if such judgment is affirmed and is paid the bond shall be void, otherwise in force. It is clear that this bond was given to secure payment of the judgment therein mentioned, provided it should be affirmed. It was used by the conservator and this appellant to effect the appeal. After the appeal has been decided adversely to appellant he now contends that the bond is not what he represented it to be when he used it in taking the appeal. We think him estopped to question the validity of this bond.—*Swofford Bros. Dry Goods Co. v. Livingston*, 16 Colo. App. 257, 65 Pac. 413.

Judgment affirmed.

Affirmed.

[No. 2588.]

DUNCAN V. THOMAS, A LUNATIC, BY LINDSEY AS HIS
CONSERVATOR.

Opinion Followed.

The judgment in this case is affirmed on the opinion in the case of *Duncan v. Thomas*, etc., ante, page 522.

Appeal from the District Court of Arapahoe County.

Messrs. DUNCAN & ANDREWS, for appellant.

Mr. H. S. VAUGHN, for appellee.

GUNTER, J.

This case differs in no essential from case of the same title decided at the present term of this court. Here the suit is upon the appeal bond given in effecting an appeal from the county court to the district court. There the action was upon the appeal bond given in carrying the case from the district court to the supreme court.

For the reasons given in such former decision the judgment of the lower court herein is affirmed.

Affirmed.

[No. 2892.]

THE FLORENCE AND CRIPPLE CREEK RAILROAD COMPANY V. MALONEY.

THE FLORENCE AND CRIPPLE CREEK RAILROAD COMPANY V. ALLEN.

Appellate Practice—Judgments—Voluntary Nonsuit—Dismissal—Redocketing on Error.

Where, after plaintiffs had concluded their testimony and rested, defendant moved that the jury be directed to return a verdict for defendant and the court announced that it would sustain it, whereupon plaintiffs asked leave to take a voluntary nonsuit without prejudice to the commencement of another action which was granted and judgment was entered accordingly, the judgment was one in favor of the defendant and against the plaintiffs, from which no appeal by defendant would lie, and an appeal by defendant from such judgment must be dismissed, but as the court would have jurisdiction to review the judgment on writ of error the cause will be redocketed on error.

*Appeal from the District Court of Fremont County.
(Consolidated Causes.)*

Mr. HENRY M. BLACKMER and Mr. KARL C. SCHUYLER, for appellant.

Mr. JOSEPH H. MAUPIN, for appellees.

WILSON, P. J.

Upon trial, after the evidence on the part of the plaintiffs had been concluded and they had rested, the defendant moved that the jury be instructed to return a verdict in its favor. The court after hearing argument on this motion, announced that it would sustain it, and that a verdict would be directed in favor of the defendant. Thereupon plaintiffs asked leave to withdraw a juror, and to amend their com-

plaints in certain particulars. This was denied. Plaintiffs then offered to prove certain matters by a certain witness. To this defendant objected, and the objection was sustained. Thereupon plaintiffs asked leave to take a voluntary nonsuit in each of the cases, without prejudice to the commencement of other suits. Defendant objected, and the objection was overruled by the court, and plaintiffs' motion for voluntary nonsuit was allowed. Judgment was entered accordingly, and defendant appeals. Appellees move to dismiss the appeal.

That in this state the right of appeal is purely statutory, and can be exercised only by the party against whom the judgment is rendered, has been settled by such numerous decisions of this court and of the supreme court, that no citation of authorities is necessary. Indeed, the proposition is not controverted by defendant. It is contended, however, that the action of the court in permitting plaintiffs to take a voluntary nonsuit under the circumstances which we have detailed, was clearly erroneous. It is urged that the action of the court in announcing that it sustained the defendant's motion, and would direct the jury to return a verdict in its favor, was equivalent to the rendition of a verdict in favor of defendant, because thereafter nothing remained to the jury but a ministerial act, vesting no discretion in them, and in the performance of which they could exercise none. The stubborn fact remains, however, that the judgment which was rendered was against the plaintiffs and in favor of the defendant. Whether the court should have rendered some other judgment does not concern us in the determination of the question as to whether the defendant can appeal from the judgment which it did render. The final judgment from which defendant seeks to appeal is in its favor, and that alone is conclusive upon its right of appeal

under the statute. It is immaterial whether the non-suit was voluntary or involuntary, the judgment was the same—the dismissal of the suit, with the costs to be taxed against the plaintiffs. Defendant complains that whilst the judgment was nominally in its favor, it was in effect adverse to it, and exceedingly prejudicial, because it permitted plaintiffs to commence another suit against it. We are cited to *Denver & Rio Grande R. R. Co. v. Iles*, 25 Colo. 23, where it was said: “The hardship to which the defendant may be subjected by being required to defend against successive actions where the plaintiff has been non-suited, may be conceded, but a trial court may in a proper case either *sua sponte* or upon defendant’s motion direct a verdict for the defendant, instead of entering a judgment as of nonsuit, and thus relieve against harassing litigation.” We may concede the hardship, but in this instance the court did not avail itself of its privilege to direct a verdict for the defendant instead of entering a judgment as of non-suit, but on the contrary, did the latter. Whether in so doing it acted wisely or unwisely is immaterial in the determination of this motion. That is a matter which the defendant is entitled to have considered upon taking the case to this court upon error.

The final judgment from which the appeal is sought as rendered by the court, was not against the party who here seeks to appeal, and in such case, this court is without jurisdiction to review it on appeal.

For this reason the motion of the appellees to dismiss the appeal must be sustained; but it appearing that the court would have jurisdiction if the action had come up on writ of error, it will be ordered that the cause be docketed on error.—Mills’ Code, sec. 388a; Laws 1893, p. 8, sec. 1.

Appeal dismissed.

[No. 2144.]

BROWN V. BELLES.

Mortgages—Foreclosure Sales—Postponement—Notice.

Where a mortgage foreclosure sale was advertised for a certain day, and the property was not offered for sale on that day, but on the day following the sheriff proceeded to sell the property which was bid in by the mortgagee, and the certificate of sale stated that the sale was made on the day it was advertised to be sold, the sale was void, and a deed thereunder conveyed nothing, but the deed constituted a menace to mortgagee's right of redemption, and if he was unable to redeem he was entitled to have the property legally sold, and an action by him to set aside the sale and cancel the certificate and deed was erroneously dismissed.

Error to the District Court of El Paso County.

Mr. W. R. GIBSON and Mr. FRED A. SABIN, for plaintiff in error.

THOMSON, J.

On the 4th day of September, 1896, Horace M. Brown was the owner of certain premises in the town of Gillett, in El Paso county, on which he resided with his family. On that day he borrowed of A. C. Belles \$150.00, and secured its repayment by a warranty deed of the premises to Belles, receiving back from the latter an instrument showing that the conveyance was to be void upon payment of the loan. On the 9th day of July, 1897, a decree of foreclosure of this mortgage was rendered by the district court of El Paso county. Afterwards, an order for the enforcement of the decree was issued to the sheriff, and the latter duly advertised a sale of the premises to take place on the 6th day of September, 1897, at the east front door of the court house, at Colorado Springs. The property was not offered for sale on that day; but, on the day following—September 7—the sheriff proceeded to the place named, where he

assumed to sell the premises to Belles at a sum, as Brown claims, far below its real value. In the certificate of sale issued by the sheriff, it is stated that the property was offered and sold on the 6th day of September—the day named in the notice. On the 8th day of March, 1898, the time for redemption not having yet elapsed, Brown brought this suit to cancel the certificate of sale, and remove the cloud which it cast upon his title. Before the trial, the day of redemption passed, and the sheriff executed and delivered a deed of the premises to Belles in pursuance of the proceedings as they were recited in the certificate of sale, which deed was immediately recorded. The court, after hearing the evidence, dismissed the case, and the plaintiff appealed.

The facts as we have stated them appear conclusively from the briefs and exhibits before us. The sale was an absolute nullity, and the deed conveyed nothing. But inasmuch as upon the face of the record the proceedings were regular, they constitute a serious menace to the plaintiff's equity of redemption. If the plaintiff was unable to pay the judgment, he was entitled to have the property sold at the time and place fixed by the notice, so that persons desiring to purchase might be present. Without further notice, to sell on a day different from that advertised, and when, consequently, bidders could not be expected, was a fraud upon the plaintiff.

The judgment will be reversed, and the district court instructed to enter a judgment setting aside the sale and cancelling the certificate and deed.

Reversed.

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ACCORD AND SATISFACTION:

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sound, such instructions cannot be reviewed by the appellate court upon a general exception to the charge, but if the charge is wholly bad or embraces but a single legal proposition, a general exception is sufficient, and special exceptions are unnecessary.—*Schollay v. Moffitt-West Drug Co.*, 126.

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abstract of record does not contain all the evidence, it will be presumed that the evidence was sufficient to sustain the judgment.—*Hartman et al. v. Reid et al.*, 407.

Evidence—Presumption—A ruling of the trial court excluding a circular offered in evidence will be presumed to have been correct when the abstract fails to advise the appellate court what the contents of the circular were.—*Stevens v. Walton*, 440.

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rested, defendant moved that the jury be directed to return a verdict for defendant and the court announced that it would sustain it, whereupon plaintiffs asked leave to take a voluntary nonsuit without prejudice to the commencement of another action which was granted and judgment was entered accordingly, the judgment was one in favor of the defendant and against the plaintiffs, from which no appeal by defendant would lie, and an appeal by defendant from such judgment must be dismissed, but as the court would have jurisdiction to review the judgment on writ of error the cause will be redocketed on error.—*The Florence and Cripple Creek Railroad Co. v. Maloney*, 526.

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BANK CHECKS: See **BILLS AND NOTES.**

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Depositors—Contracts—The contract between a bank and a depositor is that it will pay out his money only upon and in accord-

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Bank Checks—Endorsement—Identity—Liability of Bank—A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine endorsement, and if the bank mistake the identity of the payee or pay upon a forged endorsement, it is not a payment in pursuance of its authority, and it will be responsible; but a bank may be relieved from liability for payment to the wrong person, or under an endorsement not genuine, when the circumstances of the case amount to a direction from the depositor to the banker to pay without reference to identification, or to the genuineness of the endorsement.—*Ib.*

Same—The local agent of a company was directed by the company to pay to W. H. Daly a certain sum. W. H. Daly, a different person, called and claimed to be the person to whom the money was directed to be paid. The agent was not satisfied with the identity, but gave him a check payable to W. H. Daly and took a receipt therefor. The check was endorsed by W. H. Daly, and cashed at a different bank than the one on which it was drawn. The drawee bank paid the check upon the endorsement, without any knowledge of the circumstances under which it was delivered. In an action by the drawer against the drawee bank, defendant cannot escape liability on the ground that the drawer, by delivering the check to Daly, identified him as the person to whom, or upon whose endorsement, payment might properly be made.—*Ib.*

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Same—Notice—Where a check payable to W. H. Daly was endorsed by W. H. Daly, that fact was sufficient to have put the bank upon its guard and caused it to have made inquiry.—*Ib.*

Same—Where a bank had no knowledge of the error of a depositor in delivering a check to the wrong person, and the check was paid upon a written endorsement of a name different from that of the payee, in an action by the depositor to recover the amount of the check, the bank cannot invoke the doctrine, that where two persons are equally innocent and one is bound to know and act upon his knowledge and the other has no means of knowledge, the latter will not be compelled to bear a loss to exonerate the former.—*Ib.*

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Bank Checks—Endorsement—Identity—Liability of Bank—A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine endorsement, and if the bank mistake the identity of the payee or pay upon a forged endorsement, it is not a payment in pursuance of its authority, and it will be responsible; but a bank may be relieved from liability for payment to the wrong person, or under an endorsement not genuine, when the circumstances of the case amount to a direction from the depositor to the banker to pay without reference to identification, or to the genuineness of the endorsement.—*The Western Union Telegraph Co. v. The Bi-Metallic Bank*, 229.

Same—The local agent of a company was directed by the company to pay to W. H. Daly a certain sum. W. H. Daly, a different person, called and claimed to be the person to whom the money was directed to be paid. The agent was not satisfied with the identity, but gave him a check payable to W. H. Daly and took a receipt therefor. The check was endorsed by W. H. Daly, and cashed at a different bank than the one on which it was drawn. The drawee bank paid the check upon the endorsement, without any knowledge of the circumstances under which it was delivered. In an action by the drawer against the drawee bank, defendant cannot escape liability on the ground that the drawer, by delivering the check to Daly, identified him as the person to whom, or upon whose endorsement, payment might properly be made.—*Ib.*

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Same—Where a bank had no knowledge of the error of a depositor in delivering a check to the wrong person, and the check was paid upon a written endorsement of a name different from that of the payee, in an action by the depositor to recover the amount of the check, the bank cannot invoke the doctrine, that where two persons are equally innocent and one is bound to know and act upon his knowledge and the other has no means of knowledge, the latter will not be compelled to bear a loss to exonerate the former.—*Ib.*

Same—Possession—The mere possession of a check will not

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justify a bank in making payment to the person in possession without identification, or without evidence of the genuineness of the endorsement where the endorsement is in question.—*Ib.*

Pleading—Partnership—In an action against a partnership firm upon a promissory note signed by the firm, an answer that a member of the firm executed the note for a purpose outside the partnership business, and without the authority of his copartners, and that such facts were known to payee and to plaintiff before the note was endorsed to him, stated a good defense and it was error to sustain a demurrer thereto.—*King et al. v. Mecklenburg*, 312.

Endorsement—Presumption—In an action upon a promissory note by an endorsee, the law presumes that the endorsement was made before maturity, and that the endorsee acquired the note in good faith for a valuable consideration in the usual course of business and without notice of any circumstance impeaching its validity, and an answer that the note was procured by fraud of the payee states no defense in the absence of averments overcoming these presumptions.—*Ib.*

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Negotiability—Mortgages—A provision in a promissory note secured by deed of trust, to the effect that if any of the interest coupons should remain due and unpaid for thirty days the note and accrued interest might immediately be collected according to the tenor of the deed of trust, does not import into the note the terms of the deed of trust so as to render the note non-negotiable.—*Campbell et al. v. The Equitable Securities Co.*, 417.

Same—Payments—Principal and Agent—Release—A promissory note and deed of trust securing the same were executed to a securities company in Colorado, but the note and coupons were made payable at a bank in New York. The note was transferred to another company soon after its execution. The payor remitted the money to the payee, the Colorado company, to pay the coupons as they fell due, so that the money should reach its office several days before maturity, and always received an acknowledgment of the receipt of the money and later received the coupon. One of the letters acknowledging receipt of the money by the payee company stated that the coupon would be sent when received from the holder. The holder of the note collected all

BILLS AND NOTES—Continued.

the coupons at the New York bank except the last, which was collected from the Colorado company. The payor paid the principal to the Colorado company, who converted the money and failed to pay it to the holder. Held, that the payor was charged with notice of the transfer of the note, and that payment to the Colorado company was not a satisfaction of the note, and a release of the trust deed by the trustee at the request of the Colorado company was void.—Ib.

Same—Innocent Purchaser—Where a loan company loaned money and took a deed of trust to secure the same and part of the consideration was that it should pay off a former negotiable note and deed of trust on the same land, and did remit the money to pay off the same to the payee of the note, who caused a release to be executed by the trustee in the former deed of trust, but the note having been transferred before maturity, the payee converted the money and failed to pay it over to the holder, the company making the second loan was charged with notice of all that was disclosed by the former deed of trust, and stood in no better position than the payor of the note, and was not an innocent purchaser.—Ib.

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payor cannot be heard to say that the note was a conditional obligation, the payment of which depended upon realizing a sufficient sum from the sale of ores.—*The First National Bank of Aspen v. The Mineral Farm Consolidated Mining Co.*, 452.

Negotiability—The mere notation upon the face of a promissory note, "This note is secured by quitclaim deed of this date," did not charge a purchaser of the note with notice of the terms of the quitclaim deed nor affect the negotiability of the note.—*Ib.*

Payable on Demand—Maturity—Negotiability—A demand note falls due within a reasonable time, but what is a reasonable time depends upon the facts and circumstances surrounding the running of such time. If the length of time a demand note has been outstanding taken together with the facts and circumstances surrounding it would justify a reasonable presumption in the mind of the endorsee at the time of endorsement that payment upon the note had been refused or would be refused if demand were made the endorsee takes the note as dishonored, otherwise he takes as a purchaser before maturity.—*Ib.*

Same—Where a demand note had run about three months before its endorsement, and a few days before its endorsement the payor had made a payment on the note and by a resolution of its board of directors had recognized the note as an unconditional obligation and made provision for its payment, the facts and circumstances were not such as to raise a reasonable presumption that the note was dishonored at the time it was received by the endorsee.—*Ib.*

Sales—Chattel Mortgages—Plaintiffs agreed with their debtor to purchase his stock of goods and gave him their promissory note for the amount of the agreed purchase price over and above his debt to them and took from him a bill of sale. On the same day another creditor attached the goods and plaintiffs and the debtor made another agreement whereby they abandoned the sale and plaintiffs paid off the attachment claim and added it to their own claim, and took the debtor's note and a chattel mortgage on the goods to secure it. The debtor agreed to return plaintiff's note, but failed to do so, and endorsed it to defendants who had full knowledge of the transaction between plaintiffs and the debtor. Defendants transferred the note before maturity to an innocent purchaser, and plaintiffs were compelled to pay the note. Held, that plaintiffs and the debtor had a right to abandon their agreement of sale and substitute therefor the chattel mortgage. That the entire proceeding constituted but one transaction and a formal resale from plaintiffs to the debtor was not necessary.

BILLS AND NOTES—Continued.

That plaintiffs' note endorsed to defendants was without consideration and defendants were liable to plaintiffs for the amount plaintiffs were required to pay thereon.—*Falke et al. v. Brule et al.*, 499.

BILLS OF EXCEPTION: See APPELLATE PRACTICE.

BOARD OF PUBLIC WORKS:

Cities and Towns—Lighting Contracts—Powers of City Council
—A city charter creating a board of public works which is given exclusive management and control of all public and local improvements and among other things the "erection of poles, stringing of wires, laying of tracks, pipes and conduits for wires whether done by the city, corporation or individuals," does not take away from the city council and confer upon the board of public works the power to contract for lighting the streets and public grounds of the city where the power to provide for such lights is expressly granted to the city council by the charter.—*The City of Denver v. Hubbard*, 346.

BONDS:

Appeal Bonds—Action Upon—Parties—Several Damage—Injunction Bonds—Where an appeal bond is made payable to several appellees and any one of the appellees sustains damage through the taking of the appeal, even though such damage is several, such appellee may maintain a several action upon the bond therefor. And the same principle applies to an action upon an injunction bond.—*Austin v. Snider et al.*, 176

Same—Where an appeal bond and an injunction bond were made payable to plaintiff and two other appellees one of whom was sued only as receiver, and whatever interest the receiver had was held for the benefit of plaintiff, and before action was commenced on the bonds said receiver was by the court discharged, and pending the appeal the other payee in the bonds died, leaving plaintiff his sole heir at law, and no reason existed for the appointment of an administrator for the deceased payee and none was appointed, plaintiff was the only party interested in the recovery of damages upon said bonds and could maintain a several action thereon.—*Ib.*

Parties—Appeal Bonds—Action Upon—The obligee in an appeal bond died pending the appeal, and devised her entire estate to plaintiff charged with the support of her husband during his life. The husband was administrator with will annexed. No debts existed against the estate of testatrix. The husband died

BONDS—Continued.

intestate, without any debts and leaving plaintiff as his only heir. No administrator was appointed for the husband's estate, nor was any one appointed to succeed him as administrator of his wife's estate. Held, not necessary to appoint an administrator to prosecute an action upon the appeal bond, but that such action could be prosecuted by plaintiff in her own name.—*Austin v. Snider et al.*, 182.

Estates of Decedents—Wills—Probate—Appeal Bonds—In an appeal to the district court from a proceeding in the county court probating a will, where there was no executor or administrator of the estate, the appeal bond properly ran to the estate of the deceased.—*Blackman v. Edsall et al.*, 429.

Appeal Bonds—Action Upon—Concurrent Remedies—Election—Where a cause was appealed from the county court to the district court and affirmed, and an appeal was taken from the judgment of the district court to the supreme court where it was affirmed, actions may be maintained upon both appeal bonds limited, however, to one satisfaction, and it was not error to refuse to require the obligee of the bonds to elect between actions pending upon the two bonds.—*Duncan v. Thomas*, 522.

Lunatics — Conservators — Judgments — Contempts — Appeal Bonds—Satisfaction—Where a judgment was rendered against a conservator of the estate of a lunatic in favor of the estate, from which he appealed and the judgment was affirmed, and the conservator was committed for contempt for failure to pay such judgment and confined in county jail, his commitment did not operate to satisfy his obligation nor that of his sureties on his appeal bond.—*Ib.*

Appeal Bonds—Estate of Lunatic—Conservator—Where objections were filed to the report of a conservator of the estate of a lunatic, and judgment was rendered in favor of the estate against the conservator from which he appealed, giving an appeal bond running to the estate of the lunatic, after having the benefit of the appeal which was decided against him, the conservator is estopped to question the validity of the appeal bond for want of an obligee therein.—*Ib.*

BURDEN OF PROOF:

Bills and Notes—Evidence—Fraud—In an action upon a promissory note by an endorsee where the note endorsed before maturity with evidence of the genuineness of the endorsement was introduced by plaintiff, a prima facie case was made, and evidence offered by defendant that the payee had not performed the

BURDEN OF PROOF—Continued.

services for which the note was given, and that the note was executed under a misapprehension on the part of the payor that the services had been performed, in the absence of a further offer of facts to show that the execution of the note was induced by fraud of the payee, was not sufficient to overcome the prima facie case and shift the burden to plaintiff to show a purchase for value in good faith before maturity, and the evidence was not admissible for the purpose of showing a want of consideration, and was, therefore, properly rejected.—*McKinley v. Beggs*, 23.

Accord and Satisfaction—To sustain a plea of accord and satisfaction the burden of proof is upon the party relying upon such plea to show, by competent evidence, every element necessary to constitute it.—*The Board of County Commissioners of La Plata County v. Durnell*, 85.

Tax Sales—Redemption—Presumptions—Property sold for taxes cannot be redeemed by one having no interest therein. When application is made to redeem, it is the duty of the treasurer to determine whether the applicant has such interest in the property as will entitle him to redeem, and where a redemption is effected, the presumption of law is in favor of the judgment of the treasurer in allowing the redemption, and the applicant will be presumed to have had the requisite interest, and the burden is on the person attacking such redemption on that ground to rebut such presumption by evidence.—*Hartman et al. v. Reid et al.*, 407.

Tax Sales—Certificate—Assignment—In an action by one claiming as assignee of a certificate of purchase at a tax sale, where the assignment is put in issue by the answer, the burden is on the claimant to establish such assignment by evidence, and in the absence of such evidence defendant is entitled to judgment.—*Ib.*

Negligence—Railroads—Passengers—The general rule is that the party charging negligence must prove it. But where a passenger on a railroad is injured in an accident to the machinery, appliances, or means provided for his transportation, he is only required to prove the fact of the injury and show that it was caused by the failure or insufficiency of some of the agencies provided for the carriage, and the burden is then transferred to the carrier to show its freedom from fault and that the accident could not have been prevented by the utmost skill, care and prudence.—*The Denver & Rio Grande Railroad Co. v. Fotheringham*, 410.

Same—Instructions—Plaintiff, a passenger on a railroad car, was injured by the sudden jerking of the car while stopping at

BURDEN OF PROOF—Continued.

a station, which caused the plaintiff to be violently thrown against the door-facing and at the same time caused the open door of the car to suddenly swing shut, which caught and injured plaintiff's hand. Held, that the injury was not caused by any accident to the train or car or to the machinery or appliances used by defendant for the transportation of passengers such as would relieve plaintiff of the burden of proving that the injury was chargeable to defendant's negligence, and an instruction which relieved plaintiff of such burden and placed upon defendant the burden of showing that the injury was not chargeable to its negligence, was reversible error.—*Ib.*

Same—Where in an action against a railroad company the court by an erroneous instruction placed the burden of proof upon defendant to show that the accident was not due to its negligence, the error was not cured by another instruction which told the jury that the burden was upon plaintiff to prove the negligence of defendant.—*Ib.*

CHANGE OF VENUE: See **VENUE.**

CHATTEL MORTGAGES:

Sales—Bills and Notes—Plaintiffs agreed with their debtor to purchase his stock of goods and gave him their promissory note for the amount of the agreed purchase price over and above his debt to them and took from him a bill of sale. On the same day another creditor attached the goods and plaintiffs and the debtor made another agreement whereby they abandoned the sale and plaintiffs paid off the attachment claim and added it to their own claim, and took the debtor's note and a chattel mortgage on the goods to secure it. The debtor agreed to return plaintiff's note, but failed to do so, and endorsed it to defendants who had full knowledge of the transaction between plaintiffs and the debtor. Defendants transferred the note before maturity to an innocent purchaser, and plaintiffs were compelled to pay the note. Held, that plaintiffs and the debtor had a right to abandon their agreement of sale and substitute therefor the chattel mortgage. That the entire proceeding constituted but one transaction and a formal resale from plaintiffs to the debtor was not necessary. That plaintiffs' note endorsed to defendants was without consideration and defendants were liable to plaintiffs for the amount plaintiffs were required to pay thereon.—*Falke et al. v. Brule et al.*, 499.

CITIES AND TOWNS:

Negligence—Defective Sidewalks—Notice—In an action against

CITIES AND TOWNS—Continued.

a city for personal injuries caused by falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.—*The City of Boulder v. Weger*, 69.

Same—Evidence—In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in defective condition does not establish the particular defect in question, nor charge defendant with notice of such particular defect.—*Ib.*

Negligence—Dangerous Walks—Drains—Where a city keeps open for public travel a much frequented cross-walk, it is its duty to use ordinary care to keep the walk in a reasonably safe condition for travel, although it may be necessary to construct drains to remove surface water. And a city is liable for an injury to a person who, without fault of his own, fell upon a cross-walk made dangerous by the accumulation and freezing of surface water and snow, where the city had notice of such dangerous condition.—*The City of Denver v. Cochran*, 72.

Same—Evidence—Letters—Notice—In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty, concerning the walk, was admissible in evidence after his death, to show that the city had notice of the dangerous condition of the walk.—*Ib.*

Violation of Ordinance—Intoxicating Liquors—Selling on Sunday—A party cannot be convicted of violating a town ordinance by selling intoxicating liquor on Sunday where the prosecuting witnesses purchased the liquor at the instigation of the town for the purpose of laying a foundation for the prosecution.—*Wilcox v. The People*, 109.

Evidence—Admissions—Not Prejudicial—In an action against a town for injuries caused by a defective sidewalk, the admission in evidence of a conversation had with the mayor, wherein he admitted that he had known of the defect for a long while prior to the accident, and had directed it to be repaired, was not prejudicial where the evidence, outside of the conversation, was amply sufficient to charge the town with notice of the defective condition of the sidewalk.—*The Town of Colorado City v. Smith*, 172.

Negligence—Defective Walks—Notice—Evidence—In an action against a town for injuries from a fall occasioned by a loose plank in the sidewalk where the evidence located the exact de-

CITIES AND TOWNS—Continued.

fect that caused the injury, it was then competent, in order to prove notice to defendant, to show that similar defects existed in the immediate vicinity of the place where the accident occurred.—*Ib.*

Parties—Mandamus—Where the fire and police board of the city of Denver, by resolution which was duly recorded, appointed plaintiff a patrolman, and afterwards his name was erased from the record and another substituted, in an action of mandamus by plaintiff against the city and the fire and police board to compel the restoration of the record of the resolution of his appointment, the person whose name was substituted in the record was not a necessary or proper party to the proceeding.—*The City of Denver et al. v. The People ex rel. Burnett*, 190.

Action for Violation of Ordinance—Complaint—In an action before a police magistrate against a defendant for violating a town ordinance, the only process required is a summons. A complaint is unnecessary, and where a defendant appeared and went to trial upon a complaint, and the evidence did not depart from the cause laid in the complaint, and the presence of the complaint worked no prejudice to defendant, he cannot object to the insufficiency of the complaint.—*Saner et al. v. The People*, 307.

Same—Appeal—An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the complaint so far as they affected the procedure before the magistrate.—*Ib.*

Action for Violation of Ordinance—Complaint—In an action before a police magistrate against defendant for violating a town ordinance, a complaint which notifies defendant of what ordinance he is charged with violating and the manner in which it is claimed the ordinance was violated is sufficiently certain in stating the cause of action.—*Ib.*

Action for Violation of Ordinance—Appeal—Summons—An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the summons.—*Ib.*

Violation of Ordinance—Judgment—A judgment of a police magistrate convicting defendant of a violation of a town ordinance, which directs that in default of the payment of the fine adjudged against defendant, that he be confined in the town jail, or if there be no such jail, in the county jail, is warranted by section 4435, *Mills' Ann. Stats.*—*Ib.*

Contracts—Lights—Indebtedness—Constitutional Limitations—A contract between a city and an electric light company pro-

CITIES AND TOWNS—Continued.

viding for the lighting of the streets of the city by the company for a term of ten years at a stipulated price per year for each light with an obligation on the part of the city to use not less than a certain number, if a debt at all within the meaning of section 8, article 11, of the constitution, limiting the amount of municipal indebtedness, the extent of the debt is only the amount of the annual payment provided for, and not the aggregate amount of the total minimum payments to be made during the ten years.—*The City of Denver et al. v. Hubbard*, 346.

Same—Appropriations—Under the provisions of a city charter that the city council shall not order the payment of any money for any purpose in excess of the amount appropriated for the current year, nor make any contract imposing upon the city any liability to pay money, until a definite amount of money shall have been appropriated to liquidate all pecuniary liability of the city under such contract; where the city charter expressly empowered the city council to provide for lighting the streets and public buildings, a contract providing for the lighting of the streets for a term of ten years is not invalid because of a failure of the city council to make a prior appropriation to cover the liability created thereby for the entire term of the contract, but it is sufficient if an appropriation is made each year to cover the annual payment for that year.—*Ib.*

Lighting Contracts—Reasonable Term—A city has authority to contract for the lighting of its streets and public buildings for a reasonable number of years, although its charter does not expressly authorize it to make such contract. And where there is no express limit upon the power of the city council as to time, the court should not interfere with the judgment and discretion of the city council in fixing the term of such a contract unless it clearly appears that there was an abuse of discretion. Ten years held not an unreasonably long term for such contract.—*Ib.*

Same—Monopoly—A contract between a city and electric light company providing for the lighting of the streets of the city for a term of ten years, and granting the company the privilege of constructing and operating in the city a commercial electric light and power plant for the purpose of furnishing light and power to the residents of the city is not invalid on the ground that it tends to create a monopoly.—*Ib.*

Lighting Contracts—Powers of City Council—A contract by a city to secure the lighting of its streets is in the exercise of its business powers as distinguished from its governmental functions, and such a contract for a term of years is not objection-

CITIES AND TOWNS—Continued.

able as a surrender by the city council of its legislative powers.—Ib.

Same—Board of Public Works—A city charter creating a board of public works which is given exclusive management and control of all public and local improvements and among other things the "erection of poles, stringing of wires, laying of tracks, pipes and conduits for wires whether done by the city, corporation or individuals," does not take away from the city council and confer upon the board of public works the power to contract for lighting the streets and public grounds of the city where the power to provide for such lights is expressly granted to the city council by the charter.—Ib.

Lighting Contracts—A contract between a city and electric light company for lighting the streets and public grounds of the city will not be held invalid as unnecessary, excessive and unreasonable because a competing company which had been furnishing light to the city at a higher price offered to furnish the lights at a cheaper rate than that provided in the contract, such offer being made after the contract had been entered into and the contracting company had expended large sums of money towards constructing its plant, but before the ordinance legalizing the contract was finally passed by the city council.—Ib.

City of Denver—Appropriations—Fire and Police Board—Under the charter of the city of Denver the city council, in making appropriation for the expenses of the fire and police board, is required to consider and base its appropriation upon the estimate furnished by the fire and police board and not upon an estimate furnished by the mayor.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

Same—Commissioner of Supplies—Under the charter of the city of Denver the fire and police board have exclusive authority to expend for and on behalf of the city, all funds set apart in the annual appropriation ordinances for the use of the board, and a provision in the appropriation ordinance that an appropriation to purchase a fire engine, hose, etc., should be expended by the commissioner of supplies, is absolutely void and the board would have the right to direct the expenditure of the fund, notwithstanding such provision.—Ib.

Same—License Inspectors—Mandamus—The city council of the city of Denver will not be compelled by mandamus to make an appropriation to pay the salaries of license inspectors in accordance with an estimate furnished by the fire and police board where such inspectors are not provided for in the charter and

CITIES AND TOWNS—Continued.

nothing appears in the alternative writ to indicate what such inspectors are or how the office was or would be created, or how the inspectors were or would be appointed.—Ib.

City of Denver—Appropriations—Fire and Police Board—Mandamus—The charter of the city of Denver providing that the fire and police board shall present to the city council a detailed statement of the money necessary to defray the expenses of that department for the succeeding year and that the city council shall provide for the appropriation of money sufficient to defray such expenses, using the estimates of the board as a basis for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit, does not require the city council to appropriate the exact sums named in the statement of the fire and police board. If the city council should fail to make any appropriation for the use of the fire and police board it may be compelled to do so by mandamus, but it cannot be compelled by mandamus to appropriate the sums named in the statement of the fire and police board.—Ib.

CLAIMS AGAINST COUNTIES:

County Warrants—Accord and Satisfaction—Plaintiff, a county school superintendent, presented to defendant, the board of county commissioners, several itemized bills for services made out on blank forms used for that purpose, on which were printed a blank form endorsement, "the amount of \$. was allowed on the within account in full payment thereof, by order of the board of county commissioners," with blanks for dates and signature of chairman. It was the custom of the board, when an account was allowed, to fill out the blanks and the chairman signed the endorsement. Some of plaintiff's accounts were allowed in full, some in part and some wholly disallowed. Warrants were issued and accepted by plaintiff, but there were no endorsements on the warrants of any conditions upon which they were issued. There was no proof that plaintiff had any knowledge, either actual or implied, that the amounts allowed in part payment of certain bills were to be taken in full satisfaction thereof, nor that he had any knowledge of the custom of the board to make such conditions in the allowance of bills. Held, that the acceptance of the warrants by the plaintiff was not a satisfaction of the claims allowed only in part, and that plaintiff could maintain an action for the balance:—*The Board of County Commissioners of La Plata County v. Durnell*, 85.

Elections—Printing Notice, Ballots and List of Nominations—A county is liable for the reasonable value of printing official

CLAIMS AGAINST COUNTIES—Continued.

ballots, election notices and list of nominations, under the election law.—The Board of County Commissioners of San Juan County v. Tulley, 113.

Same—Pleading—Illegality of Contract—In an action against a county upon a bill for printing official ballots, election notices and list of nominations, done at the request of the county, defendant cannot question its liability on the ground that no appropriation was made therefor prior to contracting the debt, unless such defense be specially pleaded and proved.—Ib.

Pleading—Appropriation—In an action against a county by a physician for medical services and attendance to the pauper patients of the county under a contract with the board of county commissioners, it is not necessary for the complaint to allege an appropriation for that purpose prior to the execution of the contract, if such appropriation was necessary, its absence is a matter of defense to be pleaded and proved by defendant.—Miller v. The Board of County Commissioners of Weld County, 120.

Water Divisions—Salary of Superintendent—Liability of County—Evidence—In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district, and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for a short periods of floods or freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any liability against the county.—Chapman v. The Board of County Commissioners of Phillips County, 236.

CONTEMPT:

Lunatics—Conservators—Judgments—Appeal Bonds—Satisfaction—Where a judgment was rendered against a conservator of the estate of a lunatic in favor of the estate, from which he appealed and the judgment was affirmed, and the conservator was committed for contempt for failure to pay such judgment and confined in county jail, his commitment did not operate to satisfy his obligation nor that of his sureties on his appeal bond.—Duncan v. Thomas, 522.

CONTRACTS:

Settlement by New Contracts—Evidence—Where a contract

CONTRACTS—Continued.

was settled and supplanted by a new contract, all questions as to the validity of the old contract were adjusted by the settlement, and in an action upon the new contract, evidence tending to impeach the validity of the old contract was inadmissible in defense in the absence of proof of fraud or mistake in the settlement.—*Baldwin et al. v. The Central Savings Bank*, 7.

Same—Where one party to a contract assigned all her interest therein to a bank for the purpose of securing a debt owed by her to the bank, and the bank and the other party to the contract entered into a new contract in settlement of the old one, in an action by the bank upon the new contract, evidence of a conversation between plaintiff's cashier and defendant relating to the debt owed by the assignor to the bank was properly excluded in the absence of a showing of its materiality.—*Ib.*

Statute of Frauds—Pleading—In an action for damage for breach of contract, where the complaint fails to disclose whether or not the contract is in writing, if the defendant desires to avail himself of the statute of frauds, he must specially plead it.—*Ib.*

Measure of Damage—Bills and Notes—Presumption—In an action for damage for breach of contract by failure to deliver certain securities, where the securities consisted of secured promissory notes, the presumption is that the securities are worth their face value.—*Ib.*

Tender—In an action for damage for breach of contract in failing to deliver certain securities where the complaint alleged a demand of the securities and an offer to pay the agreed price and a refusal by defendant to deliver the securities on the ground of the invalidity of the contract and defendant's answer admitted the demand and offer to pay but denied any agreement of any kind with plaintiff, a tender by plaintiff of the amount agreed to be paid for the securities was not necessary to sustain plaintiff's action.—*Ib.*

Principal and Agent—Estoppel—Where plaintiff entered into a written contract with an agent of defendant for the purchase of cattle, and defendant received a copy of the contract in which the agent described himself as the agent of defendant, and also received an advance payment on the cattle, which he retained, and afterwards accepted payment for some of the cattle delivered under the contract, defendant is estopped to deny that the person assuming to act as his agent was authorized to do so.—*Farrer v. Caster*, 41.

Same—Disclaimer of Ownership—Where plaintiff purchased

CONTRACTS—Continued.

cattle from an agent of defendant as belonging to defendant, and defendant accepted and retained money that was paid as part of the purchase price he cannot evade liability on his contract for a failure to deliver the cattle as agreed, by disclaiming ownership of the cattle.—*Ib.*

Leases—Assignment—Appraisement—Notice—A lease of real estate fixed the rental value for five years, and provided that, at the end of five years, the rental should be fixed for the next five years at six per cent. per annum of the appraised value of the property to be appraised by three impartial property owners, one to be selected by each of the parties thereto, their heirs or lawful assigns or agents, and the two thus selected to select a third. The lessee assigned the lease with a stipulation that the assignee should assume all liabilities of the lessee. The lease was again assigned. At the end of the five years, an appraisement was made by appraisers selected by the lessor and the subsequent assignee then holding the lease, as provided in the contract. Held, that the first assignee was bound to the lessor for the rent as fixed by the appraisement, notwithstanding no notice was given him of the appraisement.—*Wilson v. Lunt*, 48.

Oral Evidence to Impeach Written Contract—Evidence of conversations between the contracting parties prior to and pending the execution of a written contract is admissible in evidence, where such evidence has no reference to the contents of the written contract, but its purpose is to impeach it.—*Wald v. Hobson*, 54.

Bonds—Sureties—Guaranties—An oral guaranty, given by the obligee in a bond to a surety on the bond to induce the surety to sign the bond, is not void.—*Ib.*

Same—Promise to Answer Debt of Another—Where plaintiff, who held a bill of sale to certain cattle, transferred the bill of sale in consideration of the conveyance to him of real estate, and took a bond from the grantors to satisfy an incumbrance on the real estate, and in order to induce defendant to sign the bond as a surety, represented to defendant that he was the owner of the cattle and had left them in the possession of the party who executed the bill of sale, and offered to assign the bill of sale to defendant, so that he might protect himself, and gave defendant his oral personal guaranty that the cattle were as he had represented them, and would be turned over when called for, the guaranty was an original contract and not a promise to answer the debt of another, and in an action by plaintiff upon

CONTRACTS—Continued.

the bond a failure of plaintiff's guaranty was a valid and good defense.—*Ib.*

Conveyances—Vendors' Liens—A land owner contracted with two other parties to sell certain land at a fixed price to be paid by them to him in installments at fixed times. The two parties were to have control and handling of the land, and were to plat it and expend not to exceed a certain sum in preparing it for sale as an addition to the city. The amount thus expended to be deducted from the proceeds of the first sales, and to be equally borne by the three parties. The owner agreed to execute deeds to purchasers of parcels of the land and to hold the securities arising from such sales until he was paid the agreed price. All proceeds of sale over and above the stipulated price to be equally divided between the three parties. Held, that the contract was not a sale of land by the owner to the two parties such as would give the owner a vendor's lien on the land for the purchase price, and an assignee of the interest of the owner in the contract acquired no such lien.—*Salomon v. Martin et al.*, 60.

Same—Where a land owner entered into a contract with two other parties, whereby the two were to plat the land into a city addition and sell the same, the owner to make deeds to the purchasers, and after paying the owner a stipulated price, the remainder of the proceeds of sale to be equally divided amongst the three, there could be no vendor's lien in favor of the owner alone for the unpaid purchase price of any lot or parcel of land sold under the terms of said contract.—*Ib.*

Principal and Agent—Specific Performance—Real estate agents authorized to sell certain lots subject to the approval of the owner, negotiated a sale to a purchaser who knew of the limitation upon their power, a payment was made and the agents executed a receipt therefor containing a statement of the terms of sale in duplicate. The owner refused to approve the sale unless a certain condition was inserted, and interlined the condition in its copy and endorsed its approval on the amended copy, and returned it to the agents with instructions to insert the same condition in the copy delivered to the purchaser. The purchaser refused to sign the amended receipt, but continued to deposit money in the bank as the installments came due under the original receipt. The owner directed the bank to return the purchase money, which was declined by the purchaser, who offered to pay the balance of the purchase price and demanded a deed. Held, that there was no contract for the sale of the lots that would support an action for specific performance.—*Schausten v. The Cripple Creek Gold Mines and Land Co.*, 106.

CONTRACTS—Continued.

Construction—County Physicians—Where a board of county commissioners advertised for bids for medical attendance to the paupers of the county for the period of one year, and after receiving and considering the bids passed a resolution accepting the lowest bid, and declaring the physician making it appointed as county physician pending the signing of the contract, it will be concluded that the parties to the contract intended thereby to contract for the time, services, medicine and surgical appliances called for in the notice and bid.—*Miller v. The Board of County Commissioners of Weld County*, 120.

Construction—County Physicians—Where a contract between a physician and the board of county commissioners for medical attendance and services to be rendered by the physician to the paupers of the county, in the covenants and agreements on behalf of the physician stipulated that he should furnish medicine and medical and surgical attendance to the pauper patients within the limits of the city, and in the county hospital, pest house and jail, at a fixed sum per annum, and to such patients outside the city limits at a fixed price per visit, which was in accordance with his bid, which was accepted by the board, and in a subsequent clause of the contract the board covenanted and agreed, in consideration of the covenants and agreements of the physician being kept and performed, to pay him in quarterly installments the sum for which he had agreed to attend the patients within the city limits, hospital, jail and pest house, but did not mention the fees for attendance on patients without the city limits, the contract as a whole should be construed as an agreement between the parties that the physician should perform all the services mentioned in his covenant, and that the county should receive and pay for the same the compensation and fees mentioned, notwithstanding the clause containing the covenant on behalf of the board did not mention the fees for attending patients outside the city.—*Ib.*

Water Rights—Diversion of Water—Plaintiff contracted with defendant to enlarge defendant's ditch and to run water from his own into defendant's ditch, defendant to own two-thirds and plaintiff one-third of the ditch, and water flowing therein; provided if either party should fail to furnish water in proportion to his interest he should be allowed only an amount proportioned to the volume supplied by him. Held, that the right of either party to water in proportion to the amount turned into the ditch contemplated the capacity of the ditch to carry all the water furnished by both, and that plaintiff could not by filling the ditch

CONTRACTS—Continued.

beyond his interest so that it would not carry the water defendant was entitled to run therein deprive defendant of his two-thirds interest in the water flowing in the ditch.—*Paterson v. Nurnberg et al.*, 223.

Water Rights—Division of Water—Where two parties by contract use a ditch in common, the water to be divided in proportion to the amount furnished to the ditch by each, the amount of water either party is entitled to withdraw from the ditch should be determined by the amount that runs through the ditch, and not by the amount turned in, where the capacity of the ditch at its upper end is greater than that at the lower.—*Ib.*

Banks and Banking—Depositors—The contract between a bank and a depositor is that it will pay out his money only upon and in accordance with his express direction.—*The Western Union Telegraph Co. v. The Bi-Metallic Bank*, 229.

Guaranty—Goods Sold and Delivered—An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator, is an action upon the guaranty contract, and not an action for goods sold and delivered, and the code provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply.—*Smith et al. v. The Post Printing and Publishing Co.*, 238.

Guaranty—Place of Trial—The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence.—*Ib.*

Construction—Partial Payments—Plaintiff was employed by defendant to survey and prepare for patent certain mining claims, the compensation of \$550 to be paid in installments. The provision for the third installment was for "the amount of cost of advertising and one-half the balance of said \$550.00 after deducting amounts already paid." Held, that the third installment would be the amount of cost of advertising plus one-half of the balance of the \$550 unpaid, and not one-half of said balance less said cost.—*Caryl v. Kellogg*, 245.

Mechanics' Liens—Mines and Mining—Contract to Sell—Improvements by Purchasers—Where a mine owner leased certain mining property with an option to purchase and the contract was in effect, a contract for the sale of the property with an obligation on the part of the purchaser to operate the mine and to

CONTRACTS—Continued.

invest the proceeds in the improvement of the property, and for the purpose of developing and improving said property, the purchaser purchased and attached to the property certain mill fixtures, an ore crusher, ore cars, drills and drill supplies, and the purchaser having forfeited his contract, the owner took possession of the property with all the improvements, the dealer who sold to the purchaser the mill fixtures, etc., was entitled to a lien on the interest of the owner of the mine in the property for the price of the material so furnished.—*The Hendrie & Bolthoff Manufacturing Co. v. The Holy Cross Gold Mining and Milling Co. et al.*, 341.

Cities and Towns—Lights—Indebtedness—Constitutional Limitations—A contract between a city and an electric light company providing for the lighting of the streets of the city by the company for a term of ten years at a stipulated price per year for each light with an obligation on the part of the city to use not less than a certain number, if a debt at all within the meaning of section 8, article 11 of the constitution, limiting the amount of municipal indebtedness, the extent of the debt is only the amount of the annual payment provided for, and not the aggregate amount of the total minimum payments to be made during the ten years.—*The City of Denver v. Hubbard*, 346.

Same—Appropriations—Under the provisions of a city charter that the city council shall not order the payment of any money for any purpose in excess of the amount appropriated for the current year, nor make any contract imposing upon the city any liability to pay money, until a definite amount of money shall have been appropriated to liquidate all pecuniary liability of the city under such contract; where the city charter expressly empowered the city council to provide for lighting the streets and public buildings, a contract providing for the lighting of the streets for a term of ten years is not invalid because of a failure of the city council to make a prior appropriation to cover the liability created thereby for the entire term of the contract, but it is sufficient if an appropriation is made each year to cover the annual payment for that year.—*Ib.*

Cities and Towns—Lighting Contracts—Reasonable Term—A city has authority to contract for the lighting of its streets and public buildings for a reasonable number of years, although its charter does not expressly authorize it to make such contract. And where there is no express limit upon the power of the city council as to time, the court should not interfere with the judgment and discretion of the city council in fixing the term of such

CONTRACTS—Continued.

a contract unless it clearly appears that there was an abuse of discretion. Ten years held not an unreasonably long term for such contract.—Ib.

Same—Monopoly—A contract between a city and electric light company providing for the lighting of the streets of the city for a term of ten years, and granting the company the privilege of constructing and operating in the city a commercial electric light and power plant for the purpose of furnishing light and power to the residents of the city is not invalid on the ground that it tends to create a monopoly.—Ib.

Cities and Towns—Lighting Contracts—Powers of City Council—A contract by a city to secure the lighting of its streets is in the exercise of its business powers as distinguished from its governmental functions, and such a contract for a term of years is not objectionable as a surrender by the city council of its legislative powers.—Ib.

Same—Board of Public Works—A city charter creating a board of public works which is given exclusive management and control of all public and local improvements and among other things the "erection of poles, stringing of wires, laying of tracks, pipes and conduits for wires whether done by the city, corporation or individuals," does not take away from the city council and confer upon the board of public works the power to contract for lighting the streets and public grounds of the city where the power to provide for such lights is expressly granted to the city council by charter.—Ib.

Cities and Towns—Lighting Contracts—A contract between a city and electric light company for lighting the streets and public grounds of the city will not be held invalid as unnecessary, excessive and unreasonable because a competing company which had been furnishing light to the city at a higher price offered to furnish the lights at a cheaper rate than that provided in the contract, such offer being made after the contract had been entered into and the contracting company had expended large sums of money towards constructing its plant, but before the ordinance legalizing the contract was finally passed by the city council.—Ib.

Mines and Mining—Lease—Development Work—A contract for lease of a mine for two years required the lessee to continuously work the mine with reasonable diligence and in a workmanlike manner and to keep the same timbered during the term of the lease, and in case of failure the lease was to become void. The lessee also covenanted to do a certain amount of develop-

CONTRACTS—Continued.

ment work at certain stated periods during the term. Held, that the special covenant to do the development work did not control the general covenant to work the mine continuously, and that a discontinuance of mining operations for two months forfeited the lease, and that the pumping of water from the mine during that two months did not satisfy the covenant to work the mine continuously.—*The Clear Creek Leasing, Mining and Milling Co. v. The Comstock Gold-Silver Mining and Milling Co.*, 480.

Principal and Agent—Commissione—Quantum Meruit—In an action by a real estate agent for commission where he sues for the reasonable value of his services, it is immaterial whether or not there was an agreement as to the amount of the commission.—*Williams v. Bishop et al.*, 503.

CONVEYANCES:

Water Rights—Mortgages—Notice—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Water Rights—Ownership of Canal and Reservoir—Where a canal company sold water rights with a stipulation that, when the capacity of the ditch was sold, the title to the canal should pass to the water right owners, and the company oversold the capacity of the canal, the title to an undeveloped reservoir connected with the canal and constructed by the canal company passed with the canal to, and vested in, the water right owners.—*Ib.*

Vendors' Liens—Where one person conveys real estate to another in such manner that the legal title vests in the latter, and the consideration of the sale is not paid or secured, equity allows the grantor a lien upon the land for its payment.—*Salomon v. Martin et al.*, 60.

CONVEYANCES—Continued.

Contracts—Vendors' Liens—A land owner contracted with two other parties to sell certain land at a fixed price to be paid by them to him in installments at fixed times. The two parties were to have control and handling of the land, and were to plat it and expend not to exceed a certain sum in preparing it for sale as an addition to the city. The amount thus expended to be deducted from the proceeds of the first sales, and to be equally borne by the three parties. The owner agreed to execute deeds to purchasers of parcels of the land and to hold the securities arising from such sales until he was paid the agreed price. All proceeds of sale over and above the stipulated price to be equally divided between the three parties. Held, that the contract was not a sale of land by the owner to the two parties such as would give the owner a vendor's lien on the land for the purchase price, and an assignee of the interest of the owner in the contract acquired no such lien.—Ib.

Same—Where a land owner entered into a contract with two other parties, whereby the two were to plat the land into a city addition and sell the same, the owner to make deeds to the purchasers, and after paying the owner a stipulated price, the remainder of the proceeds of sale to be equally divided amongst the three, there could be no vendors' lien in favor of the owner alone for the unpaid purchase price of any lot or parcel of land sold under the terms of said contract.—Ib.

Water Rights—A water right, even though it may be appurtenant to land, is the subject of property, and may be conveyed with or without the land.—Crippen, Trustee, v. Comstock et al., 89.

Same—Mortgages—After Acquired Water Rights—A deed of trust conveying land together with all ditches and water rights thereunto belonging without any specific mention or description of the ditch or water right, does not convey an after acquired water right and ditch not in existence at the time the trust deed was executed.—Ib.

Same—Appurtenances—Plaintiff took a deed of trust conveying certain land, together with all ditches and water rights thereunto belonging. Afterwards the grantor constructed a ditch and used the water therefrom at all times in irrigation of the land conveyed by deed of trust to plaintiff. About the time the ditch was completed the grantor executed to defendant a deed of trust to land adjoining that conveyed to plaintiff and in the deed of trust conveyed the ditch by particular description, and the water right thereby acquired. Defendant had no notice of any inten-

CONVEYANCES—Continued.

tion on the part of the grantor to appropriate and use the water so as to become an appurtenant to the land conveyed by the first deed of trust. Held, that the ditch and water right did not become an appurtenant to the land on which the water was used so as to vest in plaintiff, but that the express conveyance thereof to defendant vested in defendant the superior title.—Ib.

Mortgages—Application for Loan—After Acquired Water Right—Notice—Where a deed of trust conveyed land together with all ditches and water rights thereto belonging without any specific mention of an after acquired water right and subsequently constructed ditch, statements made in an unrecorded application for the loan or to the mortgagee in reference to such ditch and water right could have no force or effect against a subsequent mortgagee to whom the ditch and water right were expressly conveyed by deed of trust where said second mortgagee had no knowledge of such statements.—Ib.

Principal and Agent—Contracts—Specific Performance—Real estate agents authorized to sell certain lots subject to the approval of the owner, negotiated a sale to a purchaser who knew of the limitation upon their power, a payment was made and the agents executed a receipt therefor containing a statement of the terms of sale in duplicate. The owner refused to approve the sale unless a certain condition was inserted, and interlined the condition in its copy and endorsed its approval on the amended copy, and returned it to the agents with instructions to insert the same condition in the copy delivered to the purchaser. The purchaser refused to sign the amended receipt, but continued to deposit money in bank as the installments came due under the original receipt. The owner directed the bank to return the purchase money, which was declined by the purchaser, who offered to pay the balance of the purchase price and demanded a deed. Held, that there was no contract for the sale of the lots that would support an action for specific performance.—Schausten v. The Cripple Creek Gold Mines and Land Co., 106.

Record—Notice—Title—A purchaser of real estate is bound to know what the records disclose concerning the title, and if they indicate the existence of some outside condition by which it may be affected, he is bound to investigate and is charged with knowledge of the facts to which an investigation would lead. But if the records upon their face are complete, and show that the title is good, in the absence of information to the contrary from any other source, he may safely rely upon them.—The Delta County Land and Cattle Co. v. Talcott, 316.

CONVEYANCES—Continued.

Deeds of Trust—Release Deeds—Record—Innocent Purchaser—A release deed by the trustee in a deed of trust is such deed or conveyance as comes within the meaning of our recording act, and where, after the maturity of the notes secured by a deed of trust, the trustee executed to the owner of the equity of redemption a release deed which was placed on record and which recited that it was executed at the request of the payee of the notes and in consideration of their payment in full, when, in fact, the notes had not been paid, and the release was executed without the authority or knowledge of the holder of said notes, as between the holder of the notes and the owner of the equity of redemption, the release was fraudulent and void, but one who purchased from the owner for value without notice of the fact that the notes had not been paid, acquired a title free from the lien of the deed of trust.—*Ib.*

Mortgages—Homestead—Defective Acknowledgment—Where a husband and wife executed a deed of trust on their homestead to obtain an extension of time of an indebtedness due from them to a building and loan association which indebtedness was secured by valid deed of trust on the same premises, such new trust deed will not be cancelled as to the wife's homestead rights because the notary public taking the acknowledgment was a stockholder in the building and loan association, where no offer was made to pay the debt, make good her covenants nor to re-instate the former lien substituted by the new deed of trust.—*Herzel v. Schwartz et al.*, 470.

CORPORATIONS:

Failure to File Annual Report—Liability of Directors—Limitation—The liability of directors of a corporation, under section 491, Mills' Ann. Stats., for failure to file the annual report as therein required is a statutory penalty and is barred by the statute of limitations one year after the penalty is incurred, and the statute begins to run at the time of the default of the directors and not at the time the debt against the corporation matures or is made payable.—*Hazleton v. Porter et al.*, 1.

Pleading—Practice—Trespass—Motion to Make More Specific—Where a complaint charges a corporation with the commission of a trespass, a motion should not be sustained to require the complaint to be made more specific because it fails to allege through what particular officers, agents or employees of the corporation the trespass was committed.—*Commonwealth Co. v. Nunn et al.*, 117.

CORPORATIONS—Continued.

Stockholders—Right to Purchase Stock—Trover—The right of a stockholder to purchase a certain proportion of a certain amount of stock to be sold by the corporation does not give the stockholder a right to any specific shares of stock, and would not support an action in trover against another stockholder, who purchased more than his proportional part of the stock, for the excess of stock so purchased.—*Crosby v. Stratton*, 212.

Same—Pleading—In an action by one stockholder against another, a complaint which alleged that the corporation had a certain amount of capital stock for sale of which each stockholder had a right to purchase a part in proportion to the stock held by him, and that defendant caused to be issued and sold to himself a large number of shares in excess of his proportional part, but which failed to show that defendant had not acquired a right to such excess by purchase from some other stockholder or otherwise, is insufficient to allege a wrongful conversion of the stock by defendant.—*Ib.*

Same—In an action by one stockholder against another a complaint which alleges that the corporation had a certain amount of capital stock for sale, of which each stockholder had a right to purchase a part in proportion to the amount of stock held by him, but that defendant caused to be issued to himself a large number of shares in excess of the number he was entitled to purchase, and thereby plaintiff was unable to obtain the stock he was entitled to, although he was at all times ready, able and desirous to subscribe and pay for the same, but which fails to allege that he ever offered to subscribe for the same and was refused, and which fails to show what disposition was made of the balance of the stock which was more than sufficient to have supplied plaintiff, is insufficient to state a cause of action against any person as the allegations are entirely consistent with a forfeiture or abandonment of his right to purchase.—*Ib.*

Stockholders—Right to Purchase Stock—Waiver—Where a stockholder of a corporation having a right to purchase a proportional part of stock offered for sale by the corporation fails to assert his right within a reasonable time, he will be deemed to have abandoned his right.—*Ib.*

Stockholders—Preference Right to Purchase Stock—The original stockholders of a corporation have a preference right to purchase the original stock of the corporation which remains untaken at the time of the incorporation, or new stock in case of an increase of the capital stock, pro rata, according to the amount of stock held by each stockholder, but such preference

CORPORATIONS—Continued.

right does not extend to capital stock which has been issued and paid for and retransferred by the stockholders to the corporation as part of its general assets.—*Ib.*

Same—Where the stockholders of a corporation transferred to the corporation to be used as general assets part of the stock held by them, the fact that the officers of the corporation reported such stock as unissued stock could not change its character from issued to unissued stock so as to give to the stockholders a preference right to purchase the same.—*Ib.*

Bills and Notes—Conditional—Notice—Negotiability—A deed and an assignment of the grantor's interest in a mining lease was made to a corporation in consideration that the corporation should pay to a third party a certain sum as the money was received from the sale of ores. The corporation by its board of directors adopted a resolution directing its note to be given to said third party for said sum payable on demand, in compliance with the conditions of said deed, and directing its treasurer to pay on said note as fast as practicable sums received from sale of ore. The corporation's unconditional promissory note payable on demand was executed and delivered to said third party. Several payments were made and endorsed on the note. By a subsequent resolution of the board of directors the note was recognized as an unconditional debt of the corporation. The note was transferred for value without notice, to the purchaser, of the deed to the corporation or of its resolution authorizing the execution of the note, but with notice of the payments made on the note and of the subsequent resolution of the board of directors recognizing the note as unconditional. Held, that in an action upon the note the payor cannot be heard to say that the note was a conditional obligation, the payment of which depended upon realizing a sufficient sum from the sale of ores.—*The First National Bank of Aspen v. The Mineral Farm Consolidated Mining Co.*, 452.

Railroads—Names—Misnomer—Where a railroad company for convenience designated a portion of its line by a different name than that of the company, and the name so used is not the legal name of any corporation, and an action was brought against it under the designated name and summons was served upon the company and it appeared and defended the action without making any objection to the misnomer, a judgment in the case is as effective against the company as if it had been correctly named if the plaintiff move properly.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

CORPORATIONS—Continued.

Instructions—Corporate Existence—Estoppel—In an action against a railroad company an instruction to the effect that if defendant appeared and defended the suit, and appealed from the judgment of the justice of the peace to the county court, it was estopped to deny its corporate existence, states a correct principle of law and although it was unnecessary, if the defendant was not prejudiced thereby, it was not reversible error.—*Ib.*

COSTS:

Injunction—Where plaintiff sought an injunction against defendant, and defendant, by cross-complaint, sought an injunction against plaintiff, and both parties failed to make a case, each party should pay the costs incurred by his suit.—*Paterson v. Nurnberg et al.*, 223.

Appellate Practice—There were three separate suits in replevin in the lower court, a separate judgment in each case, and a separate appeal therefrom and appeal bond and transcript in each case. Held, that the three cases could not be docketed as one case in the appellate court, but must be separately docketed, and a docket fee paid in each case.—*Rachofsky et al. v. Benson*, 305.

COUNTERCLAIM:

Bills and Notes—In an action upon a joint and several promissory note, one of the makers may interpose as a counterclaim an indebtedness upon contract due him from plaintiff.—*Canfield et al. v. Arnett*, 426.

COUNTY PHYSICIANS:

Pleading—Claims Against Counties—Appropriation—In an action against a county by a physician for medical services and attendance to the pauper patients of the county under a contract with the board of county commissioners, it is not necessary for the complaint to allege an appropriation for that purpose prior to the execution of the contract, if such appropriation was necessary, its absence is a matter of defense to be pleaded and proved by defendant.—*Miller v. The Board of County Commissioners of Weld County*, 120.

Contracts—Construction—Where a board of county commissioners advertised for bids for medical attendance to the paupers of the county for the period of one year, and after receiving and considering the bids passed a resolution accepting the lowest bid, and declaring the physician making it appointed as

COUNTY PHYSICIANS—Continued.

county physician pending the signing of the contract, it will be concluded that the parties to the contract intended thereby to contract for the time, services, medicine and surgical appliances called for in the notice and bid.—Ib.

Contracts—Construction—Where a contract between a physician and the board of county commissioners for medical attendance and services to be rendered by the physician to the paupers of the county, in the covenants and agreements on behalf of the physician stipulated that he should furnish medicine and medical and surgical attendance to the pauper patients within the limits of the city, and in the county hospital, pest house and jail, at a fixed sum per annum, and to such patients outside the city limits at a fixed price per visit, which was in accordance with his bid, which was accepted by the board, and in a subsequent clause of the contract the board covenanted and agreed, in consideration of the covenants and agreements of the physician being kept and performed, to pay him in quarterly installments the sum for which he had agreed to attend the patients within the city limits, hospital, jail and pest house, but did not mention the fees for attendance on patients without the city limits, the contract as a whole should be construed as an agreement between the parties that the physician should perform all the services mentioned in his covenant, and that the county should receive and pay for the same the compensation and fees mentioned, notwithstanding the clause containing the covenant on behalf of the board did not mention the fees for attending patients outside the city.—Ib.

COUNTY WARRANTS:

Claims Against County—Accord and Satisfaction—Plaintiff, a county school superintendent, presented to defendant, the board of county commissioners, several itemized bills for services made out on blank forms used for that purpose on which were printed a blank form endorsement, "the amount of \$. was allowed on the within account in full payment thereof, by order of the board of county commissioners," with blanks for date and signature of chairman. It was the custom of the board, when an account was allowed, to fill out the blanks and the chairman signed the endorsement. Some of plaintiff's accounts were allowed in full, some in part and some wholly disallowed. Warrants were issued and accepted by plaintiff, but there were no endorsements on the warrants of any conditions upon which they were issued. There was no proof that plaintiff had any

COUNTY WARRANTS—Continued.

knowledge, either actual or implied, that the amounts allowed in part payment of certain bills were to be taken in full satisfaction thereof, nor that he had any knowledge of the custom of the board to make such conditions in the allowance of bills. Held, that the acceptance of the warrants by plaintiff was not a satisfaction of the claims allowed only in part, and that plaintiff could maintain an action for the balance.—*The Board of County Commissioners of La Plata County v. Durnell*, 85.

DAMAGES:

Measure of Damage—Bills and Notes—Presumption—In an action for damage for breach of contract by failure to deliver certain securities, where the securities consisted of secured promissory notes, the presumption is that the securities are worth their face value.—*Baldwin et al. v. The Central Savings Bank*, 7.

Instructions—Measure of Damage—Where the court had already instructed the jury that if they found for plaintiff they should estimate the damage at a specified sum, an instruction requested upon the measure of damage was properly refused.—*Id.*

Pleading—Evidence—In an action for damages for the failure of defendant to deliver cattle according to his contract of sale, a complaint which set forth in a general way the expense and loss to plaintiff, might have been required to be made more specific upon motion, but, in the absence of such motion, evidence that plaintiff had paid out money for pasture on which to put the cattle when gathered and employed men to assist in searching the range for them, and that such expense was incurred by agreement with defendant's agent who represented defendant in the sale, was admissible.—*Farrer v. Caster*, 41.

Negligence—Personal Injuries—Excessive Damage—In an action against a town for damage for personal injuries, where plaintiff, before the injury, was a strong, healthy woman, earning from \$1 to \$1.50 per day from her work, and by the injury she was rendered unfit to perform her ordinary work and is unable to earn anything, a verdict for \$2,000 will not be held excessive.—*The Town of Colorado City v. Smith*, 172.

Evidence—Ownership—Houses—Presumptions—In an action for damages for removing and converting houses used as residences, where the evidence established title in plaintiff to the lots on which the residences stood, plaintiff is presumptively the owner of the houses in the absence of evidence to the contrary.—*Pedroni v. Eppstein*, 424.

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DAMAGES—Continued.

Evidence—Instructions—In an action for damage for the removal and conversion of certain houses and the conversion of certain cows, where the uncontradicted evidence showed that plaintiff was the owner of the property and that defendant without authority, removed and appropriated the houses, and that persons in whose possession plaintiff had left the cows, without any authority sold them to defendant who took and retained them, it was not error to submit to the jury only the question of damages.—*Ib.*

Replevin—Excessive—In an action of replevin for 40 cows, yearlings and calves and 4 horses, all valued at \$2,000.00, where the property was delivered to plaintiff and detained by him for six months when defendant recovered judgment for its return an award for \$800.00 damages for its detention was excessive where defendant alleged no special damages.—*Legere Stewart, 472.*

Evidence—In an action against a railroad company for damages for burning hay it was not erroneous to permit a witness to be asked and to answer a question as to whether or not there were small trees growing on the ground where the hay was cut and in the inclosure where it was stacked where the plaintiff claimed nothing on account of the trees.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch, 491.*

DEEDS OF TRUST: See MORTGAGES.

DISTRICT ATTORNEYS:

Fees and Salaries—Trials Before Justices of the Peace—The allowance or disallowance of fees of a district attorney for trial or examination of any criminal case before a justice of the peace is wholly within the discretion of the board of county commissioners, and is not reviewable by the courts, and where the board had disallowed such fees it was error for the district court to allow them and enter judgment therefor against the county.—*The Board of County Commissioners of Yuma County v. Pendleton, 159.*

ELECTIONS:

Claims Against County—Printing Notice, Ballots and List of Nominations—A county is liable for the reasonable value of printing official ballots, election notices and list of nominations under the election law.—*The Board of County Commissioners of San Juan County v. Tulley, 113.*

ELECTRICITY:

Negligence—Prima Facie Case—Evidence—In an action against an electric light company where the evidence shows that its wires were attached to the residence of plaintiff's father about fourteen inches beneath a window where the insulators and transformer were situated; that plaintiff, a boy of twelve years of age, seeing one of the insulators off the bracket, reached down and replaced it and in doing so received a shock and was injured; that at the time of the accident the wire for the distance of one and one-half inches was uninsulated and exposed, the facts establish a prima facie case of negligence against the defendant.—*Walters v. The Denver Consolidated Electric Light Co.*, 192.

Negligence—Electric Wires—Location—Instructions—In an action against an electric light company, where the negligence alleged was that defendant permitted its wires to be uninsulated and exposed, and the evidence showed that the wires were attached to the residence of plaintiff's father beneath and within easy reach of a window, at which point the injury occurred, an instruction which told the jury that the only matter they could consider was whether or not defendant was negligent in the condition of the wire, and that they could not consider the question of negligence in placing the wire at the place where it was fastened to the wall, was erroneous. The location of the wire was a material factor in determining the degree of care to be exercised in maintaining it in a reasonably safe condition.—*Id.*

Negligence—Instructions—In an action against an electric light company by a boy twelve years old for injuries caused by coming in contact with an uninsulated wire placed on his father's residence within reach of a window, an instruction that absolved defendant from liability for the condition of the wire, except as to persons having some duty or business to perform at the point where the wire was exposed, was erroneous.—*Id.*

ESTATES OF DECEDENTS:

Parties—Appeal Bonds—Action Upon—The obligee in an appeal bond died pending the appeal, and devised her entire estate to plaintiff charged with the support of her husband during his life. The husband was administrator with will annexed. No debts existed against the estate of testatrix. The husband died intestate, without any debts and leaving plaintiff as his only heir. No administrator was appointed for the husband's estate, nor was any one appointed to succeed him as administrator of his wife's estate. Held, not necessary to appoint an adminis-

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ESTATES OF DECEDENTS—Continued.

trator to prosecute an action upon the appeal bond, but such action could be prosecuted by plaintiff in her own name.—*Austin v. Snider et al.*, 182.

Executors—Removal—Where an executor of an estate is indebted to the estate and denies the indebtedness and refuses account to the estate for the money he owes it, he is justly chargeable with mismanagement, and should be removed.—*Haines v. Christie et al.*, 272.

Wills—Probate—Appeal Bonds—In an appeal to the district court from a proceeding in the county court probating a will where there was no executor or administrator of the estate, the appeal bond properly ran to the estate of the deceased.—*Blairman v. Edsall et al.*, 429.

Pleading—Where a defendant in an action died pending the action, and his administratrix was substituted and judgment entered against her as such administratrix without any notice or summons having been served upon her and without any appearance by her in the action, in an action by her in the same court to vacate such judgment, an allegation in her complaint of a meritorious defense to the action in which the judgment was rendered is not essential.—*Symes v. Charplot*, 463.

Judgments—Parties—Substitution of Administrator—Notice—Where a party defendant died pending suit, and his administratrix was substituted as party defendant, and judgment rendered against her without any notice or summons having been served on her and without any appearance by her in the action, the judgment was void.—*Ib.*

Judgments—Collateral Attack—Where pending administration of an estate a judgment against the administratrix was tendered to the county court for filing and classification, an objection to the filing and classification on the ground that the administratrix was substituted as party defendant in the action and judgment rendered against her without any notice or summons having been served upon her and without any appearance in the cause by her, was not a collateral attack on the judgment, and the county court had jurisdiction and it was its duty to have heard the defense of the administratrix to the judgment.—*Symes v. The People*, 466.

ESTOPPEL:

Principal and Agent—Contracts—Where plaintiff entered into a written contract with an agent of defendant for the purchase of cattle, and defendant received a copy of the contract

ESTOPPEL—Continued.

which the agent described himself as the agent of defendant, and also received an advance payment on the cattle, which he retained, and afterwards accepted payment for some of the cattle delivered under the contract, defendant is estopped to deny that the person assuming to act as his agent was authorized to do so.—*Farrer v. Caster*, 41.

Same—Disclaimer of Ownership—Where plaintiff purchased cattle from an agent of defendant as belonging to defendant, and defendant accepted and retained money that was paid as part of the purchase price, he cannot evade liability on his contract for a failure to deliver the cattle as agreed, by disclaiming ownership of the cattle.—*Ib.*

Instructions—Corporations—Corporate Existence—In an action against a railroad company an instruction to the effect that if defendant appeared and defended the suit, and appealed from the judgment of the justice of the peace to the county court, it was estopped to deny its corporate existence, states a correct principle of law and although it was unnecessary, if the defendant was not prejudiced thereby, it was not reversible error.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

Appeal Bonds—Estate of Lunatic—Conservator—Where objections were filed to the report of a conservator of the estate of a lunatic, and judgment was rendered in favor of the estate against the conservator from which he appealed, giving an appeal bond running to the estate of the lunatic, after having the benefit of the appeal which was decided against him, the conservator is estopped to question the validity of the appeal bond for want of an obligee therein.—*Duncan v. Thomas*, 522.

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Contracts—Settlement by New Contracts—Where a contract was settled and supplanted by a new contract, all questions as to the validity of the old contract were adjusted by the settlement, and in an action upon the new contract, evidence tending to impeach the validity of the old contract was inadmissible in defense in the absence of proof of fraud or mistake in the settlement.—*Baldwin et al. v. The Central Savings Bank*, 7.

Same—Where one party to a contract assigned all her interest therein to a bank for the purpose of securing a debt owed by her to the bank, and the bank and the other party to the contract entered into a new contract in settlement of the old one, in an action by the bank upon the new contract, evidence of a

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conversation between plaintiff's cashier and defendant relative to the debt owed by the assignor to the bank was properly excluded in the absence of a showing of its materiality.—*Ib.*

Principal and Agent—Declarations of Agent—The declarations of an agent are not admissible in evidence against his principal unless made with reference to business in which he is authorized to act, and at the time of its transaction.—*Ib.*

Custom and Usage—Principal and Agent—The mode of transacting business by an agent may be affected, but the character or nature of the business cannot be changed, by custom or usage. In an action against a manufacturing company, located in Chicago and engaged in the manufacture and sale of mining machinery, for the value of mining machinery purchased by agent in the city of Denver, a custom, amongst agencies handling mining machinery in Denver of purchasing goods from local companies is inadmissible as tending to establish the agent's authority to purchase the machinery for his principal.—*The Gates Iron Works v. The Denver Engineering Works Co.*, 15.

Principal and Agent—Authority of Agent—Harmless Error—In an action against a company engaged in the manufacture and sale of mining machinery for the value of machinery purchased by its agent, it was error to exclude evidence offered by defendant that it knew nothing of the purchase having been made for it and that its agent had no authority to make the purchase but where plaintiff failed to prove any authority of the agent to make the purchase, the error was harmless, as there was issue to submit to the jury.—*Ib.*

Bills and Notes—Fraud—Burden of Proof—In an action upon a promissory note by an indorsee where the note indorsed before maturity with evidence of the genuineness of the indorsement was introduced by plaintiff, a prima facie case was made and evidence offered by defendant that the payee had not performed the services for which the note was given, and that the note was executed under a misapprehension on the part of the payor that the services had been performed, in the absence of further offer of facts to show that the execution of the note was induced by fraud of the payee, was not sufficient to overcome the prima facie case and shift the burden to plaintiff to show purchase for value in good faith before maturity, and the evidence was not admissible for the purpose of showing a want of consideration, and was, therefore, properly rejected.—*McKinley v. Beggs*, 23.

Voluminous Documents—Oral Evidence—In order to prove

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how much water had been contracted and sold by certain water companies, where the records of the companies containing copies of all the deeds and contracts issued by the companies were before the court and the deeds and contracts numbered about eight hundred, it was not necessary to read all the deeds and contracts to get before the court their contents, but it was permissible for a witness who had examined the records of the company and computed from the deeds and contracts the amount of water sold, to testify orally as to the result of his examination. And the witness, being familiar with the deeds and contracts issued by the companies, and being shown a sample of the contracts and deeds, might testify that all the contracts and deeds were of similar import.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Same—Proof of Records—Where two water companies had issued about eight hundred contracts and deeds for water which had been recorded in the offices of the clerks and recorders of three counties along the line of the canal, in order to prove the number of such instruments of record and the amount of water conveyed thereby, it was not necessary to introduce certified copies thereof, but a witness who had examined the records of the different counties for that purpose and counted the number of instruments on record and computed the amount of water conveyed thereby, could testify as to the result of his examination.—*Ib.*

Best and Secondary—The rule requiring the best evidence is not inflexible, but yields in certain instances when the best evidence cannot be produced without inconvenience. Where the evidence desired is the result of voluminous facts, or of the inspection of many books or papers which cannot conveniently take place in court, secondary evidence is admissible.—*Ib.*

Correspondence—Contracts—In an action upon a contract for the sale of cattle where defendant denied the execution of the contract and also the ownership of the cattle, letters of a correspondence between defendant and plaintiff relative to the place of delivery of the cattle in which defendant proposed a different place than the one named in the contract, were admissible in evidence to show the recognized relations existing between the parties at the time they were written.—*Farrer v. Caster*, 41.

Same—Where the letters of a correspondence between plaintiff and defendant were introduced in evidence to show that defendant recognized his liability under a contract, all the letters of

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the correspondence, including those written by plaintiff as well as those written by defendant, were admissible.—*Ib.*

Pleading—Damages—In an action for damages for the failure of defendant to deliver cattle according to his contract of sale, a complaint which set forth in a general way the expense and loss to plaintiff, might have been required to be made more specific upon motion, but, in the absence of such motion, evidence that plaintiff had paid out money for pasture on which to put the cattle when gathered and employed men to assist in searching the range for them, and that such expense was incurred by agreement with defendant's agent who represented defendant in the sale, was admissible.—*Ib.*

Leases—Assignment—Appraisement—Notice—Waiver—A lease of real estate fixed the rental value for five years, and provided that, at the end of five years, the rental should be fixed for the next five years at six per cent. per annum of the appraised value of the property to be appraised by three impartial property owners, one to be selected by each of the parties thereto, their heirs or lawful assigns or agents, and the two thus selected to select a third. The lessee assigned the lease with a stipulation that the assignee should assume all liabilities of the lessee. The lease was again assigned. At the end of the five years, an appraisement was made by appraisers selected by the lessor and the subsequent assignee then holding the lease. In an action by the lessor against the first assignee to recover rent as fixed by the appraisement, plaintiff began to offer proofs as to the details of the appraisement when defendant said there was no issue about the appraisement having been made, but that, as defendant had no notice of it, he was not bound. Held, a waiver of proof as to the details of the appraisement, except as to lack of notice to defendant, and that plaintiff was relieved of proving a return of the appraisement to the parties as required in the contract.—*Wilson v. Lunt*, 48.

Contracts—Oral Evidence to Impeach Written Contract—Evidence of conversations between the contracting parties prior to and pending the execution of a written contract is admissible in evidence, where such evidence has no reference to the contents of the written contract, but its purpose is to impeach it.—*Waid v. Hobson*, 54.

Immaterial—Harmless—The admission of immaterial evidence is not reversible error if such evidence is harmless.—*Ib.*

Cities and Towns—Negligence—Defective Sidewalks—Notice—In an action against a city for personal injuries caused by

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falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.—*The City of Boulder v. Weger*, 69.

Same—In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in defective condition does not establish the particular defect in question, nor charge defendant with notice of such particular defect.—*Ib.*

Negligence—Letters—Notice—In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty, concerning the walk, was admissible in evidence after his death, to show that the city had notice of the dangerous condition of the walk.—*The City of Denver v. Cochran*, 72.

Same—Objections—Where part of a letter is admissible in evidence to show notice to a city of the dangerous condition of a cross-walk, the admission of the entire letter over an objection that it is "immaterial and incompetent" is not erroneous, although part of the letter should not have been read to the jury if such part had been specifically objected to.—*Ib.*

Public Printing—Opinion of Witness—Cross-Examination—In an action against a county for the reasonable value of printing official ballots, election notices and list of nominations, where a witness testified, giving his opinion as to the value of the work, it was error to refuse the defendant permission to cross-examine such witness as to the amount of labor and material which went into the work.—*The Board of County Commissioners of San Juan County v. Tulley*, 113.

Order of Introduction—Admissions—Where plaintiffs' witnesses testified that a certain transaction by defendant was a sale, and defendant, in his own behalf, testified that it was only a temporary loan, it was permissible for plaintiffs to call witnesses on rebuttal to testify to admissions made by defendant that the transaction was a sale.—*Gray v. Sharp et al.*, 139.

Same—In an action of replevin for a wagon, where plaintiffs claimed that their vendor had bought the wagon from defendant, and defendant claimed to have temporarily loaned the wagon to said vendor, and after said vendor had testified on behalf of plaintiffs that he bought the wagon from defendant, plaintiffs rested, and defendant, in his own behalf, testified that he did not sell the wagon but only loaned it, whereupon plaintiffs called other witnesses on rebuttal, who testified that defendant

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had told them that he sold the wagon to plaintiffs' vendor was error to refuse to permit defendant to be recalled to do or explain said admissions.—Ib.

Appellate Practice—Assignments of Error—A general assignment of error of the admission of improper evidence and exclusion of proper evidence that fails to direct the attention of the appellate court to any specific testimony either admitted or excluded cannot be considered.—*Parsons v. Parsons*, 154.

Harmless Error—Fraudulent Conveyances—In an action to set aside an execution sale on the ground of fraud, where the evidence wholly failed to connect the purchasers with the fraud, the exclusion of corroborative testimony which tended to prove the fraud on the part of the judgment debtors but did not show any participation therein by the purchaser, was not prejudicial error.—*The H. B. Claffin Co. v. Lass et al.*, 156.

Appellate Practice—Verdict—Conflicting Evidence—A verdict of a jury upon conflicting testimony is conclusive on the appellate court where there is sufficient evidence to support the verdict and it is not manifestly contrary to the weight of the testimony.—*The Town of Colorado City v. Smith*, 172.

Practice—Objections—Objections to the admission of evidence without assigning any reasons therefor do not entitle a party to have such objections considered.—Ib.

Admissions—Not Prejudicial—In an action against a town for injuries caused by a defective sidewalk, the admission in evidence of a conversation had with the mayor, wherein he admitted that he had known of the defect for a long while prior to the accident, and had directed it to be repaired, was not prejudicial where the evidence, outside of the conversation, was amply sufficient to charge the town with notice of the defective condition of the sidewalk.—Ib.

Negligence—Cities and Towns—Defective Walks—Notice of Evidence—In an action against a town for injuries from a fall occasioned by a loose plank in the sidewalk where the evidence located the exact defect that caused the injury, it was then competent, in order to prove notice to defendant, to show that similar defects existed in the immediate vicinity of the place where the accident occurred.—Ib.

Negligence—Prima Facie Case—In an action against an electric light company where the evidence shows that its wires were attached to the residence of plaintiff's father about fourteen inches beneath a window where the insulators and transformers were situated; that plaintiff, a boy of twelve years of age, saw

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ing one of the insulators off the bracket, reached down and replaced it and in doing so received a shock and was injured; that, at the time of the accident the wire for the distance of one and one-half inches was uninsulated and exposed, the facts establish a prima facie case of negligence against the defendant.—*Walters v. The Denver Consolidated Electric Light Co.*, 192.

Water Divisions—Salary of Superintendent—Liability of County—In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district, and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for short periods of floods or freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any liability against the county.—*Chapman v. The Board of County Commissioners of Phillips County*, 236.

Confidential Communications—Physicians—Statutory Construction—Mills' Ann. Stats., section 4824, providing that "a physician or surgeon duly authorized to practice his profession under the laws of this state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," does not include physicians practicing outside of this state, and not authorized or licensed to practice under the laws of this state, and such unauthorized physicians are not incompetent to testify to such information.—*Head Camp Pacific Jurisdiction Woodmen of the World v. Loeher*, 247.

Hearsay—Life Insurance—Application—In an action against a mutual benefit insurance society upon an insurance certificate, testimony of a physician that prior to the time deceased made application for membership in defendant society he attended deceased as a physician and that he was then suffering from a certain disease, offered to contradict statements in the application, is not objectionable as hearsay testimony.—*Ib.*

Same—In an action against a mutual benefit insurance society upon a certificate of insurance where a physician residing in another state testified that prior to the date of the application of deceased for membership in defendant society he attended him as a physician, and that he was suffering from a certain disease,

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testimony of another witness that a short time deceased told witness he had resided at the physician testified he attended him, was admiss

Railroads—Negligence—Damage by Fire—In a railroad company to recover damages for property destroyed by fire where, in addition to the allegation of negligence in constructing the road and starting the fire, plaintiff alleged that defendant was negligent in permitting inflammable and combustible materials to accumulate upon the right of way, whereby the fire was communicated to plaintiff's property, and during several years plaintiff was not permitted to introduce any evidence of the dangerous condition of the right of way, although evidence was offered, the court ruling that plaintiff was not entitled to right of recovery to a showing of negligence in the construction or careless handling of defendant's property, such ruling of the court was prejudicial error, and the effect was not cured by the court subsequently reversing the ruling and permitting the evidence to be introduced.—*Fowler Lumber Co. et al. v. The Denver & Rio Grande R. Co. et al.*, 275.

Same—In an action against a railroad company to recover damages for property destroyed by fire, testimony that an engine belonging to defendant, and was found to have passed on the track close to the place where the fire originated a few minutes before its discovery, by the fact that the engine was examined a week or two weeks after the fire, was admissible, and its exclusion was error.—*Ib.*

Same—In an action against a railroad company to recover damages for property destroyed by fire, where testimony that the place that could have set the fire was identified, evidence that there had been out of fires at other times and places by other engines, to defendant was properly excluded.—*Ib.*

Railroads—Negligence—Damage by Fire—In an action against a railroad company to recover damages for property destroyed by fire, the fact of the origin of the fire should be established as any other material fact in the case. The jury may be permitted to infer the fact upon the evidence proved, but such proof should be amply sufficient to establish the probability of the fire having originated in any of the places considered, considering the facts, circumstances and conditions of the particular case, as disclosed by the evidence.—*Ib.*

Appellate Practice—Abstract of Record—Presumption—The abstract of record does not contain all the ev

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be presumed that the evidence was sufficient to sustain the judgment—*Hartman et al. v. Reid et al.*, 407.

Ownership—Houses—Presumptions—In an action for damages for removing and converting houses used as residences, where the evidence established title in plaintiff to the lots on which the residences stood, plaintiff is presumptively the owner of the houses in the absence of evidence to the contrary.—*Pedroni v. Eppstein*, 424.

Instructions—Damages—In an action for damage for the removal and conversion of certain houses and the conversion of certain cows, where the uncontradicted evidence showed that plaintiff was the owner of the property and that defendant, without authority, removed and appropriated the houses, and that persons in whose possession plaintiff had left the cows, without any authority sold them to defendant who took and retained them, it was not error to submit to the jury only the question of damages.—*Ib.*

Wills—Contests—Undue Influence—In the contest of a will on the ground of undue influence, the evidence required to establish the undue influence need not be of that direct, affirmative and positive character, which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.—*Blackman v. Edsall et al.*, 429.

Same—In the contest of a will on the ground of undue influence all circumstances which tend to throw any light upon the question should be considered by the jury.—*Ib.*

Value of Services—Parties—In an action to recover for services, plaintiff is a competent witness to testify to the value of his services and may be permitted to answer the direct question of what his services were worth.—*Stevens v. Walton*, 440.

Objections—Objections to the admission of evidence should be sufficiently specific to enable the court to rule upon them intelligently.—*Ib.*

Skill of Workmen—Competency of Witness—In an action for services as a photographer another photographer who worked with plaintiff was a competent witness to testify as to plaintiff's skill in his work.—*Ib.*

Action for Services—Health of Plaintiff—In an action to recover for services a statement by a witness on direct examination that the person succeeding plaintiff was a stronger man and could work longer hours does not entitle defendant on cross-

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examination to question the witness as to the state of plaintiff's health when he entered defendant's employ.—*Ib.*

Appellate Practice—Presumption—A ruling of the trial court excluding a circular offered in evidence will be presumed to have been correct when the abstract fails to advise the appellate court what the contents of the circular were.—*Ib.*

Partnership—In an action to charge defendant as a member of a partnership a newspaper article based upon an interview with defendant in which it was stated that defendant was a member of such partnership, was admissible in evidence, although the exact words used by defendant in the interview were not given, where from the evidence of the author of the article and defendant the jury would be justified in believing that the article was a substantially correct reproduction of the interview.—*Ib.*

Same—In an action to charge defendant as a member of a partnership, a newspaper article based upon an interview with defendant and stating that defendant and another had formed such partnership, a perusal of which led plaintiff to apply to the supposed partnership for employment, is admissible in evidence whether a correct reproduction of defendant's language or not, where it is shown that defendant saw the article and knew that it resulted from an interview with him, and made no effort to have it corrected.—*Ib.*

Instructions—Action for Wages—In an action for the value of services where there was no evidence that plaintiff entered the employ of defendant under an agreement whereby he was to receive no pay, an instruction to the effect that if he did enter the employ of defendant under such contract, then, unless the plaintiff proved a later contract with defendant whereby he was to receive pay, the jury must find for defendant, was properly refused.—*Ib.*

Appellate Practice—Exceptions—Judgments—Where trial is to a jury no exception to the judgment is necessary in order to enable the appellate court to consider the question as to whether the evidence was sufficient to support the judgment.—*Legere v. Stewart*, 472.

Appellate Practice—Abstract of Record—An objection that the evidence is insufficient to sustain a judgment will not be considered by the appellate court, where the evidence is not abstracted, nor printed in the abstract of record.—*Gerspach et al. v. Barhyte*, 489.

Railroads—Fires—In an action against a railroad company for

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damage caused by fire, evidence that immediately after the passage of defendant's train over its track through plaintiff's farm the fire started at its track, and that prior to the passage of the train no fire was there, was sufficient to warrant submission to the jury of the question whether the fire was chargeable to the passing train and to sustain a verdict that it was.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

Damages—In an action against a railroad company for damages for burning hay it was not erroneous to permit a witness to be asked and to answer a question as to whether or not there were small trees growing on the ground where the hay was cut and in the inclosure where it was stacked where the plaintiff claimed nothing on account of the trees.—*Ib.*

Rejection—Harmless Error—Error committed in rejecting evidence was harmless where the same evidence was admitted by the testimony of other witnesses and was uncontradicted.—*Ib.*

Principal and Agent—Commission—Quantum Meruit—In an action by a real estate agent for commission where the evidence showed that he was entitled to commission, and he testified that his services were worth a certain sum, and his evidence as to value was uncontradicted, he was entitled to judgment for that amount.—*Williams v. Bishop et al.*, 503.

Same—Evidence examined and held sufficient to entitle a real estate agent to commission on a sale of property.—*Ib.*

Appellate Practice—Directing Judgment—Where a cause has been twice tried without material change of the evidence and each time the evidence showed plaintiff to be entitled to a judgment for a certain sum, and there is no reason to believe that there would be any material change in the evidence at another trial, the judgment of the lower court for defendant will be reversed and judgment for plaintiff directed.—*Ib.*

Assignment of Debt—An assignment of a debt may be by parol and may be inferred from the acts and conduct of the party.—*Forsyth v. Ryan*, 511.

Fire Insurance—Loss—Evidence discussed and held sufficient to sustain a judgment in an action upon a policy of fire insurance for loss by fire.—*The Farmers' Alliance Mutual Fire Insurance Co. v. Trombly*, 513.

Appellate Practice—Credibility of Witnesses—The question of the relative credibility of witnesses is settled by the verdict of the jury and will not be considered by the appellate court.—*Ib.*

Appellate Practice—Verdict—Fire Insurance—In an action on

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a policy of fire insurance for loss by fire where the jury returned a verdict for plaintiff upon conflicting evidence submitted to them under proper instructions and there is sufficient evidence to support the verdict, it will not be reversed on the ground that it is against the weight of evidence on defendant's plea that the fire was caused by the wilful act of plaintiff.—*The Farmers' Alliance Mutual Fire Insurance Co. v. Stewart*, 517.

EXECUTIONS:

Homesteads—Execution Liens—Where an execution was sued out and levied upon real estate prior to the designation of the real estate as a homestead by the execution defendant, the execution lien is superior to the homestead claim.—*Jones et al. v. Olson*, 144.

Levy upon Real Estate—Where a sheriff, upon receipt of an execution, made out and published in a newspaper a notice of sale of certain real estate under the execution, in which the execution was described, and it was stated that he had levied upon the real estate as the property of the execution defendant, and filed a copy of such notice with the clerk and recorder of the county, it was a legal and valid levy.—*Ib.*

Fraudulent Conveyances—Execution Sale—Innocent Purchaser—Where, at an execution sale, a junior execution creditor purchased the property to protect his junior lien, such sale cannot be set aside by other creditors as fraudulent without connecting the purchaser with such fraud.—*The H. B. Clafin Co. v. Lass et al.*, 156.

EXECUTORS: See **ESTATES OF DECEDENTS.**

FEES: See **SALARIES AND FEES.**

FIRE AND POLICE BOARD:

Cities and Towns—City of Denver—Appropriations—Under the charter of the city of Denver the city council, in making appropriation for the expenses of the fire and police board, is required to consider and base its appropriation upon the estimate furnished by the fire and police board and not upon an estimate furnished by the mayor.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

Same—Commissioner of Supplies—Under the charter of the city of Denver the fire and police board have exclusive authority to expend for and on behalf of the city, all funds set apart in the annual appropriation ordinances for the use of the board, and

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a provision in the appropriation ordinance that an appropriation to purchase a fire engine, hose etc., should be expended by the commissioner of supplies, is absolutely void and the board would have the right to direct the expenditure of the fund, notwithstanding such provision.—Ib.

Same—License Inspectors—Mandamus—The city council of the city of Denver will not be compelled by mandamus to make an appropriation to pay the salaries of license inspectors in accordance with an estimate furnished by the fire and police board where such inspectors are not provided for in the charter and nothing appears in the alternative writ to indicate what such inspectors are or how the office was or would be created, or how the inspectors were or would be appointed.—Ib.

City of Denver—Appropriations—Fire and Police Board—Mandamus—The charter of the city of Denver providing that the fire and police board shall present to the city council a detailed statement of the money necessary to defray the expenses of that department for the succeeding year and that the city council shall provide for the appropriation of money sufficient to defray such expenses, using the estimates of the board as a basis for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit, does not require the city council to appropriate the exact sums named in the statement of the fire and police board. If the city council should fail to make any appropriation for the use of the fire and police board it may be compelled to do so by mandamus, but it cannot be compelled by mandamus to appropriate the sums named in the statement of the fire and police board.—Ib.

FRAUD:

Judgments—Pleading—In an action upon a judgment an answer which alleges that defendant employed an attorney to conduct his defense in the action in which the judgment was rendered, and expected him to introduce in evidence a receipt for the indebtedness sued upon, and to prove the payment thereof by certain named witnesses, and that defendant is informed and believes and upon such information and belief alleges that plaintiffs colluded and conspired with his attorney whereby said attorney did not make any defense and allowed a false and fraudulent judgment to be entered against defendant, is insufficient to charge fraud in procuring the judgment, and states no defense to the action.—Harter v. Shull, 162.

Judgments—Collateral Attack—In an action upon a judgment

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a defense that the judgment was procured through fraud is a collateral attack.—*Ib.*

FRAUDULENT CONVEYANCES:

Sales—Instructions—In an action of replevin where the only issue was as to whether defendant had sold the wagon in controversy to plaintiffs' vendor or had only loaned it, it was error to instruct the jury upon the question of fraudulent conveyance of personal property.—*Gray v. Sharp et al.*, 139.

Execution Sale—Innocent Purchaser—Where, at an execution sale, a junior execution creditor purchased the property to protect his junior lien, such sale cannot be set aside by other creditors as fraudulent without connecting the purchaser with such fraud.—*The H. B. Claffin Co. v. Lass et al.*, 156.

Same—Evidence—Harmless—Error—In an action to set aside an execution sale on the ground of fraud, where the evidence wholly failed to connect the purchasers with the fraud, the exclusion of corroborative testimony which tended to prove the fraud on the part of the judgment debtors but did not show any participation therein by the purchaser, was not prejudicial error.—*Ib.*

Replevin—Pleading Evidence—In an action of replevin to recover property from an officer taken under an execution where plaintiff claims the property by purchase from the execution defendant, the defense that the sale to plaintiff was void because not followed by an immediate and continuous change of possession is admissible under a general denial of plaintiff's title, and it is not necessary that such defense be specially pleaded.—*Israel, U. S. Marshal, v. Day*, 200.

Replevin—Sales—Instructions—In an action of replevin to recover property from an officer taken under execution where plaintiff claimed to have purchased the property from the execution debtor and defendant claimed that the sale to plaintiff was void because not followed by an immediate delivery and continuous change of possession, an instruction which told the jury that the controlling question was whether or not the property at the time it was taken under execution was owned by and in the possession of plaintiff or the execution debtor, and that if the property was that of plaintiff their verdict should be for plaintiff, was erroneous and misleading, because it failed to distinguish between a title good as between the parties to the sale and one good as against the creditors of the seller.—*Ib.*

Replevin—Sales—Change of Possession—Instructions—In a contest of the title to personal property as between a purchaser and

FRAUDULENT CONVEYANCES—Continued.

the creditors of the seller, an instruction, that, to make the sale valid as against creditors of the seller, the change of possession must be open, notorious and visible, but that "to constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another if the buyer does such acts as make visible signs of his ownership and maintains that relation to the property purchased which owners of property generally sustain to their own property," is erroneous in failing to require the sale to be accompanied by immediate delivery, and the change of possession required by the instruction is not such actual change as is required by the statute. The instruction is also defective in failing to explain in what cases removal of the property is not required, and in failing to define what acts of ownership would be sufficient.—*Ib.*

GUARANTY:

Bonds—Sureties—An oral guaranty, given by the obligee in a bond to a surety on the bond to induce the surety to sign the bond, is not void.—*Wald v. Hobson*, 54.

Same—Promise to Answer Debt of Another—Where plaintiff, who held a bill of sale to certain cattle, transferred the bill of sale in consideration of the conveyance to him of real estate, and took a bond from the grantors to satisfy an incumbrance on the real estate, and in order to induce defendant to sign the bond as a surety, represented to defendant that he was the owner of the cattle and had left them in the possession of the party who executed the bill of sale, and offered to assign the bill of sale to defendant, so that he might protect himself, and gave defendant his oral personal guaranty that the cattle were as he had represented them, and would be turned over when called for, the guaranty was an original contract and not a promise to answer the debt of another, and in an action by plaintiff upon the bond a failure of plaintiff's guaranty was a valid and good defense.—*Ib.*

Bonds—Sureties—Fraud—Instructions—In an action upon a bond where the surety defended by alleging that he was induced to sign the bond by the personal guaranty of plaintiff of the existence of certain facts which would protect defendant from liability, and alleging a breach of the guaranty, the court properly refused an instruction on the question of fraudulent representations, although the instruction was a correct statement of the law in cases where relief is sought on that ground.—*Ib.*

Same—Statu Quo—In an action against a surety on a bond, the

GUARANTY—Continued.

defendant alleged that he was induced to sign the bond as a surety by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale, and which bill of sale he assigned to defendant, and alleged a breach of the guaranty. The evidence showed that the bill of sale had been lost. Held, that an instruction requested by plaintiff that, to enable defendant to avail himself of the defense of failure of consideration, he must return the bill of sale, was properly refused.—*Ib.*

Same—Enquiry—In an action by the obligee against a surety on a bond where defendant alleged that he was induced to sign the bond by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale and which bill of sale he assigned to defendant, it was not incumbent on defendant to make any inquiry as to the truth or falsity of plaintiff's statements, and an instruction requested by plaintiff, that if defendant could have protected himself against the false representations of plaintiff by ordinary care and prudence he could not avail himself of the defense of fraud, was properly refused.—*Ib.*

Contracts—Goods Sold and Delivered—An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator, is an action upon the guaranty contract, and not an action for goods sold and delivered, and the code provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply.—*Smith et al. v. The Post Printing and Publishing Co., 238.*

Contracts—Place of Trial—The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence.—*Ib.*

HOMESTEADS:

Execution Liens—Where an execution was sued out and levied upon real estate prior to the designation of the real estate as a homestead by the execution defendant, the execution lien is superior to the homestead claim.—*Jones et al. v. Olson, 144.*

Mortgages—Defective Acknowledgment—Where a husband and wife executed a deed of trust on their homestead to obtain an extension of time of an indebtedness due from them to a building and loan association which indebtedness was secured by

HOMESTEADS—Continued.

valid deed of trust on the same premises, such new trust deed will not be cancelled as to the wife's homestead rights because the notary public taking the acknowledgment was a stockholder in the building and loan association, where no offer was made to pay the debt, make good her covenants nor to reinstate the former lien substituted by the new deed of trust.—*Hirzel v. Schwartz et al.*, 470.

INJUNCTION:

Costs—Where plaintiff sought an injunction against defendant and defendant, by cross-complaint, sought an injunction against plaintiff, and both parties failed to make a case, each party should pay the costs incurred by his suit.—*Paterson v. Nurnberg et al.*, 223.

INJUNCTION BONDS: See **BONDS**.

INSTRUCTIONS:

Practice—Mathematical Computation—Where the amount of recovery, if any, is merely a matter of mathematical computation, it is not error for the court to make the computation and instruct the jury, if they find for plaintiff, they should estimate the damage at a specified sum.—*Baldwin et al. v. The Central Savings Bank*, 7.

Measure of Damage—Where the court had already instructed the jury that if they found for plaintiff they should estimate the damage at a specified sum, an instruction requested upon the measure of damage was properly refused.—*Ib.*

Requested—It is not error to refuse to give instructions requested if they are substantially given in other instructions.—*Ib.*

Bonds—Sureties—Guaranties—Fraud—In an action upon a bond where the surety defended by alleging that he was induced to sign the bond by the personal guaranty of plaintiff of the existence of certain facts which would protect defendant from liability, and alleging a breach of the guaranty, the court properly refused an instruction on the question of fraudulent representations, although the instruction was a correct statement of the law in cases where relief is sought on that ground.—*Wald v. Hobson*, 54.

Same—Statu Quo—In an action against a surety on a bond, the defendant alleged that he was induced to sign the bond as a surety by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale, and which bill of sale he assigned to defendant, and alleged a breach of the

INSTRUCTIONS—Continued.

guaranty. The evidence showed that the bill of sale had been lost. Held, that an instruction requested by plaintiff that, to enable defendant to avail himself of the defense of failure of consideration, he must return the bill of sale, was properly refused.—*Ib.*

Same—Enquiry—In an action by the obligee against a surety on a bond where defendant alleged that he was induced to sign the bond by the personal guaranty of plaintiff that he was the owner of certain cattle to which he held a bill of sale and which bill of sale he assigned to defendant, it was not incumbent on defendant to make any enquiry as to the truth or falsity of plaintiff's statements, and an instruction requested by plaintiff, that if defendant could have protected himself against the false representations of plaintiff by ordinary care and prudence he could not avail himself of the defense of fraud, was properly refused.—*Ib.*

Attorney and Client—Employment by Another Attorney—Liability of Client—Where defendants employed an attorney to perform certain services and said attorney employed plaintiffs, who were also attorneys, to assist him, and although defendants knew the services were being performed by plaintiffs, they believed that plaintiffs were proceeding under employment of their attorney and that he alone was liable for their fees, defendants are not liable to plaintiffs for their fees, and an instruction which told the jury that if plaintiffs performed the services and defendants knew they were being rendered, defendants were liable, is erroneous.—*McCarthy et al. v. Crump et al.*, 110.

Appellate Practice—Exceptions—If instructions to a jury embrace distinct legal propositions, and any one of the propositions is sound, such instructions can not be reviewed by the appellate court upon a general exception to the charge, but if the charge is wholly bad or embraces but a single legal proposition, a general exception is sufficient, and special exceptions are unnecessary.—*Schollay v. Moffit-West Drug Co.*, 126.

Principal and Agent—Sales—Ratification—In an action for goods sold to defendant's unauthorized agent in several different bills evidenced by orders made at different times by the agent, an instruction that an appropriation by defendant of any portion of the articles purchased would render defendant liable for the whole, was erroneous. An appropriation of the goods or a portion of the goods purchased under one order or contract would not be a ratification of a purchase under an entirely separate and different contract.—*Ib.*

INSTRUCTIONS—Continued.

Not Responsive to Issues—Sales—In an action of replevin for a wagon where plaintiffs claimed that their vendor purchased the wagon from defendant, and defendant denied that he sold the wagon, but claimed that he had only temporarily loaned it to plaintiff's vendor, and there was no evidence tending to show that defendant invested said vendor with apparent ownership and title to the wagon, or permitted him to hold himself out to the world as the owner, it was error to instruct the jury that, although defendant had not sold the wagon to said vendor, if he invested him with apparent ownership and permitted him to hold himself out to the world as the owner, and on the strength of such ownership, plaintiffs purchased it for a valuable consideration, they should find for plaintiffs.—*Gray v. Sharp et al.*, 139.

Same—Fraud—In an action of replevin where the only issue was as to whether defendant had sold the wagon in controversy to plaintiffs' vendor or had only loaned it, it was error to instruct the jury upon the question of fraudulent conveyance of personal property.—*Ib.*

Appellate Practice—Harmless Error—Where the facts are such that the trial court could have directed the verdict that was returned, had he been requested to do so, errors in the instructions given are immaterial, and will not be considered on appeal.—*Parsons v. Parsons*, 154.

Negligence—Electric Wires—Location—In an action against an electric light company, where the negligence alleged was that defendant permitted its wires to be uninsulated and exposed, and the evidence showed that the wires were attached to the residence of plaintiff's father beneath and within easy reach of a window, at which point the injury occurred, an instruction which told the jury that the only matter they could consider was whether or not defendant was negligent in the condition of the wire, and that they could not consider the question of negligence in placing the wire at the place where it was fastened to the wall, was erroneous. The location of the wire was a material factor in determining the degree of care to be exercised in maintaining it in a reasonably safe condition.—*Walters v. The Denver Consolidated Electric Light Co.*, 192.

Negligence—In an action against an electric light company by a boy twelve years old for injuries caused by coming in contact with an uninsulated wire placed on his father's residence within reach of a window, an instruction that absolved defendant from liability for the condition of the wire, except as to persons hav-

INSTRUCTIONS—Continued.

ing some duty or business to perform at the point where the wire was exposed, was erroneous.—Ib.

Replevin—Sale—Statute of Fraud—In an action of replevin to recover property from an officer taken under execution where plaintiff claimed to have purchased the property from the execution debtor and defendant claimed that the sale to plaintiff was void because not followed by an immediate delivery and continuous change of possession, an instruction which told the jury that the controlling question was whether or not the property at the time it was taken under execution was owned by and in the possession of plaintiff or the execution debtor, and that if the property was that of plaintiff their verdict should be for plaintiff, was erroneous and misleading, because it failed to distinguish between a title good as between the parties to the sale and one good as against the creditors of the seller.—Israel, U. S. Marshal, v. Day, 200.

Replevin—Sales—Change of Possession—In a contest of the title to personal property as between a purchaser and the creditors of the seller, an instruction, that, to make the sale valid as against creditors of the seller, the change of possession must be open, notorious and visible, but that "to constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another if the buyer does such acts as make visible signs of his ownership and maintains that relation to the property purchased which owners of property generally sustain to their own property," is erroneous in failing to require the sale to be accompanied by immediate delivery, and the change of possession required by the instruction is not such actual change as is required by the statute. The instruction is also defective in failing to explain in what cases removal of the property is not required, and in failing to define what acts of ownership would be sufficient.—Ib.

Negligence—Burden of Proof—Railroads—Passengers—Plaintiff, a passenger on a railroad car, was injured by the sudden jerking of the car while stopping at a station, which caused the plaintiff to be violently thrown against the door-facing and at the same time caused the open door of the car to suddenly swing shut, which caught and injured plaintiff's hand. Held, that the injury was not caused by any accident to the train or car or to the machinery or appliances used by defendant for the transportation of passengers such as would relieve plaintiff of the burden of proving that the injury was chargeable to defendant's negligence, and an instruction which relieved plaintiff

INSTRUCTIONS—Continued.

of such burden and placed upon defendant the burden of showing that the injury was not chargeable to its negligence, was reversible error.—*The Denver & Rio Grande Railroad Co. v. Fotheringham*, 410.

Same—Where in an action against a railroad company the court by an erroneous instruction placed the burden of proof upon defendant to show that the accident was not due to its negligence, the error was not cured by another instruction which told the jury that the burden was upon plaintiff to prove the negligence of defendant.—*Ib.*

Evidence—Damages—In an action for damage for the removal and conversion of certain houses and the conversion of certain cows, where the uncontradicted evidence showed that plaintiff was the owner of the property and that defendant, without authority, removed and appropriated the houses, and that persons in whose possession plaintiff had left the cows, without any authority sold them to defendant who took and retained them, it was not error to submit to the jury only the question of damages.—*Pedroni v. Eppstein*, 424.

Wills—Instructions on the issue of undue influence in the execution of a will discussed and approved.—*Blackman v. Edsall et al.*, 429.

Action for Wages—In an action for the value of services where there was no evidence that plaintiff entered the employ of defendant under an agreement whereby he was to receive no pay, an instruction to the effect that if he did enter the employ of defendant under such contract, then, unless the plaintiff proved a later contract with defendant whereby he was to receive pay, the jury must find for defendant, was properly refused.—*Stevens v. Walton*, 440.

Corporations—Corporate Existence—Estoppel—In an action against a railroad company an instruction to the effect that if defendant appeared and defended the suit, and appealed from the judgment of the justice of the peace to the county court, it was estopped to deny its corporate existence, states a correct principle of law and although it was unnecessary, if the defendant was not prejudiced thereby, it was not reversible error.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

INSURANCE—FIRE:

Subrogation—Statutory Liability—Where property which is insured is destroyed by fire under such circumstances that the

INSURANCE—FIRE—Continued.

owner has an action for damage against the person causing the fire, and the owner collects the insurance, the insurance company may be subrogated to the right of the owner to an action against the person responsible for the fire, whether the right of action be statutory or at common law, but where the action is statutory it must be brought in the name of the owner.—*The Crissey & Fowler Lumber Co. et al. v. The Denver & Rio Grande Railroad Co. et al.*, 275.

Limitation—The fact that an action on a fire insurance policy was not commenced within the time limited by the policy and by-laws of the company within which such action might be commenced would not defeat the action if the plaintiff was induced to delay the commencement of the action by demands of the defendant for further statement and information concerning the loss, and by continual promises of adjustment.—*The Farmers' Alliance Mutual Fire Insurance Co. v. Trombly*, 513.

Loss—Evidence—Evidence discussed and held sufficient to sustain a judgment in an action upon a policy of fire insurance for loss by fire.—*Ib.*

Appellate Practice—Evidence—Verdict—In an action on a policy of fire insurance for loss by fire where the jury returned a verdict for plaintiff upon conflicting evidence submitted to them under proper instructions and there is sufficient evidence to support the verdict, it will not be reversed on the ground that it is against the weight of evidence on defendant's plea that the fire was caused by the wilful act of plaintiff.—*The Farmers' Alliance Mutual Fire Insurance Co. v. Stewart*, 517.

INTOXICATING LIQUORS:

Cities and Towns—Violation of Ordinance—Selling on Sunday—A party cannot be convicted of violating a town ordinance by selling intoxicating liquor on Sunday where the prosecuting witness purchased the liquor at the instigation of the town for the purpose of laying a foundation for the prosecution.—*Wilcox v. The People*, 109.

JUDGMENTS:

Lunatics—Conservators—Notice—A judgment adjudging a person a lunatic and appointing a conservator of his estate, rendered without notice to the lunatic, is a nullity.—*Jones, Conservator, v. Learned*, 76.

Lunatics—Conservators—Juries—A judgment declaring a person a lunatic and appointing a conservator of his estate, without

JUDGMENTS—Continued.

the verdict of a jury finding such person so insane or distracted as to render him incapable or unfit to care for or manage his estate, is without authority and void.—*Ib.*

Executions—Limitation—Statutory Construction—The act of 1891 (Session Laws 1891, page 246), amending section 1835, General Statutes, and providing that from and after ten years from the entry of final judgment in any court of this state it shall be considered as satisfied in full unless revived as provided by law, is prospective only, and does not apply to judgments rendered prior to the passage of the act. Execution may issue on judgments rendered prior to the adoption of said act at any time within twenty years from the entry of such judgments.—*Jones et al. v. The Stockgrowers' National Bank*, 79.

Appellate Practice—Final Judgment—Denying Default—An order quashing service of summons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court.—*Brockway v. The W. & T. Smith Co.*, 96.

Appellate Practice—Presumption of Regularity—On appeal a judgment of a court of general jurisdiction having jurisdiction of the subject-matter and parties, and power to enter the judgment in question, is presumed to be regular in every respect unless the contrary appears from the record.—*Carnahan v. Conolly*, 98.

Pleading—In an action upon a judgment a denial of any indebtedness puts nothing in issue.—*Harter v. Shull*, 162.

Pleading—Payment—In an action upon a judgment, an answer alleging payment of the obligation upon which the judgment was rendered prior to the recovery of the judgment states no defense to the action.—*Ib.*

Pleading—Fraud—In an action upon a judgment an answer which alleges that defendant employed an attorney to conduct his defense in the action in which the judgment was rendered, and expected him to introduce in evidence a receipt for the indebtedness sued upon, and to prove the payment thereof by certain named witnesses, and that defendant is informed and believes and upon such information and belief alleges that plaintiffs colluded and conspired with his attorney whereby said attorney did not make any defense and allowed a false and fraudulent judgment to be entered against defendant, is insufficient to charge fraud in procuring the judgment, and states no defense to the action.—*Ib.*

Collateral Attack—Fraud—In an action upon a judgment a de-

JUDGMENTS—Continued.

fense that the judgment was procured through fraud is a collateral attack.—*Ib.*

Collateral Attack—A judgment rendered by a court of competent jurisdiction cannot be collaterally attacked unless it is absolutely void. And the rule applies equally to domestic and foreign judgments.—*Ib.*

Cities and Towns—Violation of Ordinance—A judgment of a police magistrate convicting defendant of a violation of a town ordinance, which directs that in default of the payment of the fine adjudged against defendant, that he be confined in the town jail, or if there be no such jail, in the county jail, is warranted by section 4435, Mills' Ann. Stats.—*Saner et al. v. The People*, 307.

Action to Vacate—Direct Attack—An action brought in the court where a judgment was rendered to vacate such judgment on the ground that no notice or summons was served on the judgment defendant, is a direct attack on the judgment sought to be vacated.—*Symes v. Charplot*, 463.

Same—Pleading—Estates of Decedents—Where a defendant in an action died pending the action, and his administratrix was substituted and judgment entered against her as such administratrix without any notice or summons having been served upon her and without any appearance by her in the action, in an action by her in the same court to vacate such judgment, an allegation in her complaint of a meritorious defense to the action in which the judgment was rendered is not essential.—*Ib.*

Parties—Substitution of Administrator—Notice—Where a party defendant died pending suit, and his administratrix was substituted as party defendant, and judgment rendered against her without any notice or summons having been served on her and without any appearance by her in the action, the judgment was void.—*Ib.*

Estates of Decedents—Collateral Attack—Where pending administration of an estate a judgment against the administratrix was tendered to the county court for filing and classification, an objection to the filing and classification on the ground that the administratrix was substituted as party defendant in the action and judgment rendered against her without any notice or summons having been served upon her and without any appearance in the cause by her, was not a collateral attack on the judgment, and the county court had jurisdiction and it was its duty to have heard the defense of the administratrix to the judgment.—*Symes v. The People*, 466.

JUDGMENTS—Continued.

Void for Want of Jurisdiction—The defense that a judgment is void for want of jurisdiction of the person of defendant in the court rendering the judgment is available to the defendant in any proceeding on the judgment.—*Ib.*

Appellate Practice—Exceptions—Evidence—Where trial is to a jury no exception to the judgment is necessary in order to enable the appellate court to consider the question as to whether the evidence was sufficient to support the judgment.—*Legere v. Stewart*, 472.

Replevin—Termination of Right of Possession—Return—Where a number of cattle consisting of cows, yearlings and calves were taken under writ of replevin and defendant by answer and cross-complaint claimed the right of possession of all the cattle under a lease, and ownership of one-half of the yearlings and calves as the natural increase during the continuance of the lease, and before trial the term of the lease had expired, a judgment for defendant for the return of all the cattle or for their value was erroneous.—*Ib.*

Replevin—Verdict—Return—In an action of replevin, a verdict for defendant, "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return of the same," will not support a judgment for the return of the property. The attempt to award a return was not a finding that defendant was entitled to a return as required by code. Power to award a return belongs to the court after the jury has found that the party is entitled to it.—*Ib.*

Law of the Case—Title to Office—Emoluments—In an action to try title to an office a judgment for respondent was reversed by the court of appeals, the opinion of the court stating that relator was lawfully appointed to the office and that his attempted removal and the appointment of respondent were void and that the judgment ought to have been one ousting respondent and putting the relator into possession. When the remittitur was filed in the lower court the term of office in controversy had expired and the parties stipulated that the judgment of the court of appeals should be made the judgment of the lower court, and an order for such judgment was signed. Judgment was then entered for relator for costs without specifically awarding title to the office. In a subsequent action by relator against respondent to recover the fees and emoluments collected by respondent while wrongfully in possession of the office, the judgment in the

JUDGMENTS—Continued.

former case was sufficient to establish plaintiff's right and he was entitled to recover.—*Jones v. Carver*, 484.

Appellate Practice—Directing Judgment—Where a cause has been twice tried without material change of the evidence and each time the evidence showed plaintiff to be entitled to a judgment for a certain sum, and there is no reason to believe that there would be any material change in the evidence at another trial, the judgment of the lower court for defendant will be reversed and judgment for plaintiff directed.—*Williams v. Bishop et al.*, 503.

Lunatics—Conservators—Contempts—Appeal Bonds—Satisfaction—Where a judgment was rendered against a conservator of the estate of a lunatic in favor of the estate, from which he appealed and the judgment was affirmed, and the conservator was committed for contempt for failure to pay such judgment and confined in county jail, his commitment did not operate to satisfy his obligation nor that of his sureties on his appeal bond.—*Duncan v. Thomas*, 522.

Appellate Practice—Voluntary Nonsuit—Dismissal—Redocketing on Error—Where, after plaintiffs had concluded their testimony and rested, defendant moved that the jury be directed to return a verdict for defendant and the court announced that it would sustain it, whereupon plaintiffs asked leave to take a voluntary nonsuit without prejudice to the commencement of another action, which was granted and judgment was entered accordingly. The judgment was one in favor of the defendant and against the plaintiffs, from which no appeal by defendant would lie, and an appeal by defendant from such judgment must be dismissed, but as the court would have jurisdiction to review the judgment on writ of error the cause will be redocketed on error.—*The Florence and Cripple Creek Railroad Co. v. Maloney*, 526.

JURIES:

Lunatics—Conservators—Judgments—A judgment declaring a person a lunatic and appointing a conservator of his estate, without the verdict of a jury finding such person so insane or distracted as to render him incapable or unfit to care for or manage his estate, is without authority and void.—*Jones, Conservator, v. Learned*, 76.

Challenge for Cause—Harmless Error—The erroneous overruling of challenges for cause to juries is not prejudicial where it appears that neither of the jurors challenged served on the jury,

JURIES—Continued.

and does not appear that the challenging party exhausted his peremptory challenges in order to get rid of them.—*Blackman v. Edsall et al.*, 429.

JURISDICTION:

Appellate Practice—Failure to Pray Appeal Within Time—Appearance—Waiver—The requirement of the code that an appeal must be prayed for within five days after judgment is rendered is jurisdictional, and where an appeal was prayed for more than five days after the judgment was rendered, the appellee by entering a general appearance in the appellate court, does not waive the requirement, but the appeal must be dismissed upon motion made at any time before final hearing and judgment.—*Roseberry v. The Valley Building and Loan Association*, 448.

Estates of Decedents—Judgments—Collateral Attack—Where pending administration of an estate a judgment against the administratrix was tendered to the county court for filing and classification, an objection to the filing and classification on the ground that the administratrix was substituted as party defendant in the action and judgment rendered against her without any notice or summons having been served upon her and without any appearance in the cause by her, was not a collateral attack on the judgment, and the county court had jurisdiction and it was its duty to have heard the defense of the administratrix to the judgment.—*Symes v. The People*, 466.

Judgments—Void for Want of Jurisdiction—The defense that a judgment is void for want of jurisdiction of the person of defendant in the court rendering the judgment is available to the defendant in any proceeding on the judgment.—*Ib.*

LEASES:

Contracts—Assignment—Appraisement—Notice—A lease of real estate fixed the rental value for five years, and provided that, at the end of five years, the rental should be fixed for the next five years at six per cent. per annum of the appraised value of the property to be appraised by three impartial property owners, one to be selected by each of the parties thereto, their heirs or lawful assigns or agents, and the two thus selected to select a third. The lessee assigned the lease with a stipulation that the assignee should assume all liabilities of the lessee. The lease was again assigned. At the end of the five years an appraisement was made by appraisers selected by the lessor and the subsequent assignee then holding the lease, as provided in

LEASES—Continued.

the contract. Held, that the first assignee was bound to the lessor for the rent as fixed by the appraisal, notwithstanding no notice was given him of the appraisal.—*Wilson v. Lunt*, 48.

Same—Evidence—Waiver—In an action by the lessor against the first assignee to recover rent as fixed by the appraisal, plaintiff began to offer proofs as to the details of the appraisal when defendant said there was no issue about the appraisal having been made, but that, as defendant had no notice of it, he was not bound. Held, a waiver of proof as to the details of the appraisal, except as to lack of notice to defendant, and that plaintiff was relieved of proving a return of the appraisal to the parties as required in the contract.—*Ib.*

Mines and Mining—Contracts—Development Work—A contract for lease of a mine for two years required the lessee to continuously work the mine with reasonable diligence and in a workmanlike manner and to keep the same timbered during the term of the lease, and in case of failure the lease was to become void. The lessee also covenanted to do a certain amount of development work at certain stated periods during the term. Held, that the special covenant to do the development work did not control the general covenant to work the mine continuously, and that a discontinuance of mining operations for two months forfeited the lease, and that the pumping of water from the mine during the two months did not satisfy the covenant to work the mine continuously.—*The Clear Creek Leasing, Mining and Milling Co. v. The Comstock Gold-Silver Mining and Milling Co.*, 480.

LIMITATION:

Corporations—Failure to File Annual Report—Liability of Directors—The liability of directors of a corporation, under section 491, *Mills' Ann. Stats.*, for failure to file the annual report as therein required is a statutory penalty and is barred by the statute of limitations one year after the penalty is incurred, and the statute begins to run at the time of the default of the directors and not at the time the debt against the corporation matures or is made payable.—*Hazleton v. Porter et al.*, 1.

Judgments—Executions—Statutory Construction—The act of 1891 (*Session laws 1891*, page 246), amending section 1835, *General Statutes*, and providing that from and after ten years from the entry of final judgment in any court of this state it shall be

LIMITATION—Continued.

considered as satisfied in full unless revived as provided by law, is prospective only, and does not apply to judgments rendered prior to the passage of the act. Execution may issue on judgments rendered prior to the adoption of said act at any time within twenty years from the entry of such judgments.—*Jones et al. v. The Stockgrowers' National Bank*, 79.

Fire Insurance—The fact that an action on a fire insurance policy was not commenced within the time limited by the policy and by-laws of the company within which such action might be commenced would not defeat the action if the plaintiff was induced to delay the commencement of the action by demands of the defendant for further statement and information concerning the loss, and by continual promises of adjustment.—*The Farmers' Alliance Mutual Fire Insurance Co. v. Trombly*, 513.

LUNATICS:

Conservators—Judgments—Notice—A judgment adjudging a person a lunatic and appointing a conservator of his estate, rendered without notice to the lunatic, is a nullity.—*Jones, Conservator, v. Learned*, 76.

Conservators—Judgments—Juries—A judgment declaring a person a lunatic and appointing a conservator of his estate, without the verdict of a jury finding such person so insane or distracted as to render him incapable or unfit to care for or manage his estate, is without authority and void.—*Ib.*

Conservators—Judgments—Contempts—Appeal Bonds—Satisfaction—Where a judgment was rendered against a conservator of the estate of a lunatic in favor of the estate, from which he appealed and the judgment was affirmed, and the conservator was committed for contempt for failure to pay such judgment and confined in county jail, his commitment did not operate to satisfy his obligation nor that of his sureties on his appeal bond.—*Duncan v. Thomas*, 522.

Appeal Bonds—Estate of Lunatic—Conservator—Where objections were filed to the report of a conservator of the estate of a lunatic, and judgment was rendered in favor of the estate against the conservator from which he appealed, giving an appeal bond running to the estate of the lunatic, after having the benefit of the appeal which was decided against him, the conservator is estopped to question the validity of the appeal bond for want of an obligee therein.—*Ib.*

MANDAMUS:

Parties—Cities and Towns—Where the fire and police board of the city of Denver, by resolution which was duly recorded, appointed plaintiff a patrolman, and afterwards his name was erased from the record and another substituted, in an action of mandamus by plaintiff against the city and fire and police board to compel the restoration of the record of the resolution of his appointment, the person whose name was substituted in the record was not a necessary or proper party to the proceeding.—*The City of Denver et al. v. The People ex rel. Burnett*, 190.

License Inspectors—The city council of the city of Denver will not be compelled by mandamus to make an appropriation to pay the salaries of license inspectors in accordance with an estimate furnished by the fire and police board where such inspectors are not provided for in the charter and nothing appears in the alternative writ to indicate what such inspectors are or how the office was or would be created, or how the inspectors were or would be appointed.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

City of Denver—Appropriations—Fire and Police Board—The charter of the city of Denver providing that the fire and police board shall present to the city council a detailed statement of the money necessary to defray the expenses of that department for the succeeding year and that the city council shall provide for the appropriation of money sufficient to defray such expenses, using the estimates of the board as a basis for such appropriation, and conforming thereto as nearly as the condition of the city finances will permit, does not require the city council to appropriate the exact sums named in the statement of the fire and police board. If the city council should fail to make any appropriation for the use of the fire and police board it may be compelled to do so by mandamus, but it cannot be compelled by mandamus to appropriate the sums named in the statement of the fire and police board.—*Ib.*

Practice—Demurrer—A demurrer to the answer in mandamus proceedings relates back to the alternative writ, and if that writ is insufficient it should be so adjudged.—*Ib.*

MEASURE OF DAMAGE: See **DAMAGE.**

MECHANICS' LIENS:

Mines and Mining—Contract to Sell—Improvements by Purchaser—Where a mine owner leased certain mining property with an option to purchase and the contract was in effect, a con-

MECHANICS' LIENS—Continued.

tract for the sale of the property with an obligation on the part of the purchaser to operate the mine and to invest the proceeds in the improvement of the property, and for the purpose of developing and improving said property, the purchaser purchased and attached to the property certain mill fixtures, an ore crusher, ore cars, drills and drill supplies, and the purchaser having forfeited his contract, the owner took possession of the property with all the improvements, the dealer who sold to the purchaser the mill fixtures, etc., was entitled to a lien on the interest of the owner of the mine in the property for the price of the material so furnished.—*The Hendrie & Bolthoff Manufacturing Co. v. The Holy Cross Gold Mining and Milling Co. et al.*, 341.

MINES AND MINING:

Mechanics' Liens—Contract to Sell—Improvements by Purchaser—Where a mine owner leased certain mining property with an option to purchase and the contract was in effect, a contract for the sale of the property with an obligation on the part of the purchaser to operate the mine and to invest the proceeds in the improvement of the property, and for the purpose of developing and improving said property, the purchaser purchased and attached to the property certain mill fixtures, an ore crusher, ore cars, drills and drill supplies, and the purchaser having forfeited his contract, the owner took possession of the property with all the improvements, the dealer who sold to the purchaser the mill fixtures, etc., was entitled to a lien on the interest of the owner of the mine in the property for the price of the material so furnished.—*The Hendrie & Bolthoff Manufacturing Co. v. The Holy Cross Gold Mining and Milling Co. et al.*, 341.

Lease—Contracts—Development Work—A contract for lease of a mine for two years required the lessee to continuously work the mine with reasonable diligence and in a workmanlike manner and to keep the same timbered during the term of the lease, and in case of failure the lease was to become void. The lessee also covenanted to do a certain amount of development work at certain stated periods during the term. Held, that the special covenant to do the development work did not control the general covenant to work the mine continuously, and that a discontinuance of mining operations for two months forfeited the lease, and that the pumping of water from the mine during that two months did not satisfy the covenant to work the mine continuously.—*The Clear Creek Leasing, Mining and Milling Co. v. The Comstock Gold-Silver Mining and Milling Co.*, 480.

MISNOMER:

Corporations—Railroads—Names—Where a railroad company for convenience designated a portion of its line by a different name than that of the company, and the name so used is not the legal name of any corporation, and an action was brought against it under the designated name and summons was served upon the company and it appeared and defended the action without making any objection to the misnomer, a judgment in the case is as effective against the company as if it had been correctly named if the plaintiff move properly.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

MORTGAGES:

Water Rights—Conveyances—Notice—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Water Rights—Parties—Where a canal company sold water rights with a stipulation that when the capacity of the canal was sold, the ownership of the canal and other property and franchises of the company should vest in the water right owners and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operating the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system.—*Ib.*

Water Rights—Conveyances—After Acquired Rights—A deed

MORTGAGES—Continued.

of trust conveying land together with all ditches and water rights thereunto belonging without any specific mention or description of the ditch or water right, does not convey an after acquired water right and ditch not in existence at the time the trust deed was executed.—Crippen, Trustee, v. Comstock et al., 89.

Same—Appurtenances—Plaintiff took a deed of trust conveying certain land, together with all ditches and water rights thereunto belonging. Afterwards the grantor constructed a ditch and used the water therefrom at all times in irrigation of the land conveyed by deed of trust to plaintiff. About the time the ditch was completed the grantor executed to defendant a deed of trust to land adjoining that conveyed to the plaintiff and in the deed of trust conveyed the ditch by particular description, and the water right thereby acquired. Defendant had no notice of any intention on the part of the grantor to appropriate and use the water so as to become an appurtenant to the land conveyed by the first deed of trust. Held, that the ditch and water right did not become an appurtenant to the land on which the water was used so as to vest in plaintiff, but that the express conveyance thereof to defendant vested in defendant the superior title.—Ib.

Application for Loan—After Acquired Water Right—Notice—Where a deed of trust conveyed land together with all ditches and water rights thereto belonging without any specific mention of an after acquired water right and subsequently constructed ditch, statements made in an unrecorded application for the loan or to the mortgagee in reference to such ditch and water right could have no force or effect against a subsequent mortgagee to whom the ditch and water right were expressly conveyed by deed of trust where said second mortgagee had no knowledge of such statements.—Ib.

Bills and Notes—Trust Deeds—Unauthorized Foreclosure—Purchaser with Notice—Where the payee of a note secured by a deed of trust transferred the note before maturity, and afterwards through fraudulent representations obtained from the holder possession of two unpaid interest coupons cut from said note and without the knowledge or consent of the owner of the note the trustee proceeded to foreclose the deed of trust for the default in payment of the two interest coupons and at the sale the property was bought by said payee the foreclosure was a nullity and a purchaser from said payee, with knowledge of the facts acquired no title as against the holder of the note and cannot object to a foreclosure of the deed of trust by the legal

MORTGAGES—Continued.

holder of the note.—*Cheney et al. v. Murto, Administrator of Turbutt's Estate*, 149.

Judicial Foreclosure—Sales—In a judicial foreclosure of a mortgage the sheriff alone is authorized to execute the decree of foreclosure and sell the land, and it is error for the court to appoint a commissioner, other than the sheriff, to make such foreclosure sale, where such appointment is at the time objected to.—*Blitz et al. v. Moran*, 253.

Deeds of Trust—Release Deeds—Record—Innocent Purchaser—A release deed by the trustee in a deed of trust is such deed or conveyance as comes within the meaning of our recording act, and where, after the maturity of the notes secured by a deed of trust, the trustee executed to the owner of the equity of redemption a release deed which was placed on record and which recited that it was executed at the request of the payee of the notes and in consideration of their payment in full, when, in fact, the notes had not been paid, and the release was executed without the authority or knowledge of the holder of said notes, as between the holder of the notes and the owner of the equity of redemption, the release was fraudulent and void, but one who purchased from the owner for value without notice of the fact that the notes had not been paid, acquired a title free from the lien of the deed of trust.—*The Delta County Land and Cattle Co. v. Talcott*, 316.

Bills and Notes—Negotiability—A provision in a promissory note secured by deed of trust, to the effect that if any of the interest coupons should remain due and unpaid for thirty days the note and accrued interest might immediately be collected according to the tenor of the deed of trust, does not import into the note the terms of the deed of trust so as to render the note non-negotiable.—*Campbell et al. v. The Equitable Securities Co.*, 417.

Same—Payments—Principal and Agent—Release—A promissory note and deed of trust securing the same were executed to a securities company in Colorado, but the note and coupons were made payable at a bank in New York. The note was transferred to another company soon after its execution. The payor remitted the money to the payee, the Colorado company, to pay the coupons as they fell due, so that the money should reach its office several days before maturity, and always received an acknowledgment of the receipt of the money and later received the coupon. One of the letters acknowledging receipt of the money by the payee company stated that the coupon

MORTGAGES—Continued.

would be sent when received from the holder. The holder of the note collected all the coupons at the New York bank except the last, which was collected from the Colorado company. The payor paid the principal to the Colorado company, who converted the money and failed to pay it to the holder. Held, that the payor was charged with notice of the transfer of the note, and that payment to the Colorado company was not a satisfaction of the note and a release of the trust deed by the trustee at the request of the Colorado company was void.—*Ib.*

Same—Innocent Purchaser—Where a loan company loaned money and took a deed of trust to secure the same and part of the consideration was that it should pay off a former negotiable note and deed of trust on the same land, and did remit the money to pay off the same to the payee of the note, who caused a release to be executed by the trustee in the former deed of trust, but the note having been transferred before maturity, the payee converted the money and failed to pay it over to the holder, the company making the second loan was charged with notice of all that was disclosed by the former deed of trust, and stood in no better position than the payor of the note, and was not an innocent purchaser.—*Ib.*

Homestead—Defective Acknowledgment—Where a husband and wife executed a deed of trust on their homestead to obtain an extension of time of an indebtedness due from them to a building and loan association, which indebtedness was secured by valid deed of trust on the same premises, such new trust deed will not be cancelled as to the wife's homestead rights because the notary public taking the acknowledgment was a stockholder in the building and loan association, where no offer was made to pay the debt, make good her covenants nor to re-instate the former lien substituted by the new deed of trust.—*Hirzel v. Schwartz et al.*, 470.

Foreclosure Sales—Postponement—Notice—Where a mortgage foreclosure sale was advertised for a certain day, and the property was not offered for sale on that day, but on the day following, the sheriff proceeded to sell the property which was bid in by the mortgagee, and the certificate of sale stated that the sale was made on the day it was advertised to be sold, the sale was void, and a deed thereunder conveyed nothing, but the deed constituted a menace to mortgagee's right of redemption, and if he was unable to redeem he was entitled to have the property legally sold, and an action by him to set aside the sale and cancel the certificate and deed was erroneously dismissed.—*Brown v. Belles*, 529.

NEGLIGENCE:

Cities and Towns—Defective Sidewalks—Notice—In an action against a city for personal injuries caused by falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.—*The City of Boulder v. Weger*, 69.

Same—Evidence—In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in defective condition does not establish the particular defect in question, nor charge defendant with notice of such particular defect.—*Ib.*

Cities and Towns—Dangerous Walks—Drains—Where a city keeps open for public travel a much frequented cross-walk, it is its duty to use ordinary care to keep the walk in a reasonably safe condition for travel, although it may be necessary to construct drains to remove surface water. And a city is liable for an injury to a person who, without fault of his own, fell upon a cross-walk made dangerous by the accumulation and freezing of surface water and snow, where the city had notice of such dangerous condition.—*The City of Denver v. Cochran*, 72.

Same—Evidence—Letters—Notice—In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty concerning the walk, was admissible in evidence after his death, to show that the city had notice of the dangerous condition of the walk.—*Ib.*

Same—Objections—Where part of a letter is admissible in evidence to show notice to a city of the dangerous condition of a cross-walk, the admission of the entire letter over an objection that it is "immaterial and incompetent" is not erroneous, although part of the letter should not have been read to the jury if such part had been specifically objected to.—*Ib.*

Personal Injuries—Excessive Damages—In an action against a town for damage for personal injuries, where plaintiff, before the injury, was a strong, healthy woman, earning from \$1 to \$1.50 per day from her work, and by the injury she was rendered unfit to perform her ordinary work, and is unable to earn anything, a verdict for \$2,000 will not be held excessive.—*The Town of Colorado City v. Smith*, 172.

Evidence—Admissions—Not Prejudicial—In an action against a town for injuries caused by a defective sidewalk, the admission in evidence of a conversation had with the mayor, wherein he admitted that he had known of the defect for a long while prior

NEGLIGENCE—Continued.

to the accident, and had directed it to be repaired, was not prejudicial where the evidence, outside of the conversation, was amply sufficient to charge the town with notice of the defective condition of the sidewalk.—*Ib.*

Cities and Towns—Defective Walks—Notice—Evidence—In an action against a town for injuries from a fall occasioned by a loose plank in the sidewalk where the evidence located the exact defect that caused the injury, it was then competent, in order to prove notice to defendant, to show that similar defects existed in the immediate vicinity of the place where the accident occurred.—*Ib.*

Prima Facie Case—Evidence—In an action against an electric light company where the evidence shows that its wires were attached to the residence of plaintiff's father about fourteen inches beneath a window where the insulators and transformer were situated; that plaintiff, a boy of twelve years of age, seeing one of the insulators off the bracket, reached down and replaced it and in doing so received a shock and was injured; that at the time of the accident the wire for the distance of one and one-half inches was uninsulated and exposed, the facts establish a prima facie case of negligence against the defendant.—*Walters v. The Denver Consolidated Electric Light Co., 192.*

Contributory Negligence—Question for Jury—In an action against an electric light company, the question as to whether plaintiff, a twelve-year-old boy, was guilty of contributory negligence in attempting to replace an insulator on its bracket, is one for the jury to determine.—*Ib.*

Electric Wires—Location—Instructions—In an action against an electric light company, where the negligence alleged was that the defendant permitted its wires to be uninsulated and exposed, and the evidence showed that the wires were attached to the residence of the plaintiff's father beneath and within easy reach of a window, at which point the injury occurred, an instruction which told the jury that the only matter they could consider was whether or not defendant was negligent in the condition of the wire, and that they could not consider the question of negligence in placing the wire at the place where it was fastened to the wall, was erroneous. The location of the wire was a material factor in determining the degree of care to be exercised in maintaining it in a reasonably safe condition.—*Ib.*

Instructions—In an action against an electric light company by a boy twelve years old for injuries caused by coming in contact with an uninsulated wire placed on his father's residence

NEGLIGENCE—Continued.

within reach of a window, an instruction that absolved defendant from liability for the condition of the wire, except as to persons having some duty or business to perform at the point where the wire was exposed, was erroneous.—*Ib.*

Pleading—Damage by Fire—Statutory and Common-Law Liability—In an action against a railroad company to recover damages for property destroyed by fire, where plaintiff in one count alleged a statutory liability without reference to the question of negligence, and in another count alleged a common-law liability based wholly upon defendant's negligence, the complaint stated two distinct causes of action, and it was prejudicial error to compel plaintiff to elect upon which count he would proceed, and to strike the other count from the complaint.—*The Crissey & Fowler Lumber Co. et al. v. The Denver & Rio Grande Railroad Co. et al.*, 275.

Pleading—Separate Counts—Railroads—Damage by Fire—In an action against a railroad company to recover damages for property destroyed by fire, the complaint contained one count predicated solely upon the defendant's negligence in causing and setting out a fire upon its right of way, and in and about its depot and platform, and in negligently causing and permitting it to escape from its right of way to plaintiff's property. Another count charged a liability for the results of fire caused in the operation of defendant's line of road, and specified various alleged negligent acts in such operation, particularly the dangerous condition of the right of way at the place where the fire originated by permitting inflammable and combustible material to accumulate thereon, by which the fire was communicated to plaintiff's property, and the negligent construction of defendant's depot and platform, and a failure to provide and maintain suitable appliances to extinguish fire. Another count alleged the negligent placing and leaving of a car of powder on defendant's tracks in its yards in violation of a city ordinance, and the negligent failure to remove the car of powder from its exposed position when the fire originated, whereby the firemen of the city were deterred and prevented from extinguishing the fire. Held, that the different counts are not repetitions of the same facts so as to be obnoxious to the code provision prohibiting unnecessary repetition, and that it was prejudicial error to require plaintiff to elect one count upon which to proceed and to strike the others from the complaint.—*Ib.*

Same—Statutory and Common-Law Liability—In an action against a railroad company to recover damages for property de-

NEGLIGENCE—Continued.

stroyed by fire where the complaint alleged a statutory liability and a common-law liability in separate counts, and plaintiff was compelled to elect upon which count to proceed, and having elected to proceed upon the common-law count was permitted to amend it so as to include the allegations of a statutory liability, a ruling of the court restricting plaintiff to the common-law remedy was prejudicial error.—Ib.

Railroads—Damage by Fire—Evidence—In an action against a railroad company to recover damages for property destroyed by fire where, in addition to the allegation of negligence in operating the road and starting the fire, plaintiff alleged negligence in permitting inflammable and combustible material to accumulate and remain upon the right of way, whereby the fire was communicated to the plaintiff's property, and during several days of the trial plaintiff was not permitted to introduce any evidence as to the dangerous condition of the right of way, although such testimony was offered, the court ruling that plaintiff was restricted in its right of recovery to a showing of negligence in the defective construction or careless handling of defendant's locomotives, such ruling of the court was prejudicial error, and its prejudicial effect was not cured by the court subsequently ruling otherwise and permitting the evidence to be introduced.—Ib.

Same—In an action against a railroad company to recover damages for property destroyed by fire, testimony as to the condition of an engine belonging to the defendant, and which was shown to have passed on the track close to the place where the fire originated a few minutes before its discovery, by a witness who examined the engine a week or two weeks after the fire, was admissible, and its exclusion was error.—Ib.

Same—In an action against a railroad company to recover damages for property destroyed by fire, where the only engine that could have set the fire was identified, evidence of the setting out of fires at other times and places by other engines belonging to defendant was properly excluded.—Ib.

Railroads—Damage by Fire—Evidence—In an action against a railroad company to recover damages for property destroyed by fire, the fact of the origin of the fire should be established like any other material fact in the case. The jury within certain limits may be permitted to infer the fact upon circumstances proved, but such proof should be amply sufficient to rebut the probability of the fire having originated in any other way, considering the facts, circumstances and conditions of the particular case, as disclosed by the evidence.—Ib.

NEGLIGENCE—Continued.

Burden of Proof—Railroads—Passengers—The general rule is that the party charging negligence must prove it. But where a passenger on a railroad is injured in an accident to the machinery, appliances, or means provided for his transportation, he is only required to prove the fact of the injury and show that it was caused by the failure or insufficiency of some of the agencies provided for the carriage, and the burden is then transferred to the carrier to show its freedom from fault and that the accident could not have been prevented by the utmost skill, care and prudence.—*The Denver & Rio Grande Railroad Co. v. Fotheringham*, 410.

Same—Instructions—Plaintiff, a passenger on a railroad car, was injured by the sudden jerking of the car while stopping at a station, which caused the plaintiff to be violently thrown against the door-facing and at the same time caused the open door of the car to suddenly swing shut, which caught and injured the plaintiff's hand. Held, that the injury was not caused by any accident to the train or car or to the machinery or appliances used by the defendant for the transportation of passengers such as would relieve plaintiff of the burden of proving that the injury was chargeable to defendant's negligence, and an instruction which relieved plaintiff of such burden and placed upon defendant the burden of showing that the injury was not chargeable to its negligence, was reversible error.—*Ib.*

Same—Where in an action against a railroad company the court, by an erroneous instruction placed the burden of proof upon defendant to show that the accident was not due to its negligence, the error was not cured by another instruction which told the jury that the burden was upon plaintiff to prove the negligence of defendant.—*Ib.*

Railroads—Fires—Evidence—In an action against a railroad company for damage caused by fire, evidence that immediately after the passage of the defendant's train over its track through plaintiff's farm the fire started at its track, and that prior to the passage of the train no fire was there, was sufficient to warrant a submission to the jury of the question whether the fire was chargeable to the passing train and to sustain a verdict that it was.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

NEGOTIABLE INSTRUMENTS: See **BILLS AND NOTES.**

NONSUIT:

Appellate Practice—Judgments—Dismissal—Redocketing on Error—Where, after plaintiffs had concluded their testimony and

NONSUIT—Continued.

rested, defendant moved that the jury be directed to return a verdict for defendant and the court announced that it would sustain it, whereupon plaintiffs asked leave to take a voluntary nonsuit without prejudice to the commencement of another action which was granted and judgment was entered accordingly. The judgment was one in favor of the defendant and against the plaintiffs from which no appeal by defendant would lie, and an appeal by defendant from such judgment must be dismissed, but as the court would have jurisdiction to review the judgment on writ of error the cause will be redocketed on error.—*The Florence & Cripple Creek Railroad Co. v. Maloney*, 526.

NOTICE:

Water Rights—Conveyances—Mortgages—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Cities and Towns—Negligence—Defective Sidewalks—In an action against a city for personal injuries caused by falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.—*The City of Boulder v. Weger*, 69.

Same—Evidence—In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in a defective condition does not establish the particular defect in question, nor charge the defendant with notice of such particular defect.—*Ib.*

Negligence—Evidence—Letters—In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty, concerning the walk, was admissible in evidence after his death,

NOTICE—Continued.

to show that the city had notice of the dangerous condition of the walk.—*The City of Denver v. Cochran*, 72.

Lunatics—Conservators—Judgments—A judgment adjudging a person a lunatic and appointing a conservator of his estate, rendered without notice to the lunatic, is a nullity.—*Jones, Conservator, v. Learned*, 76.

Practice—Dismissal—Waiver—Appearance—Where the court of its own motion called a case as within a rule for dismissal for want of prosecution, and plaintiff's counsel had case set for hearing on question as to whether or not it should be dismissed, and voluntarily appeared at such hearing and without objection went into the trial of the question, he waived objection that no notice was served upon him.—*Carnahan v. Connolly*, 98.

Principal and Agent—Notice received by an agent affecting the business he is authorized to transact while he is engaged in its transaction is notice to his principal.—*Schollay v. Moffitt-West Drug Co.*, 126.

Conveyances—Record—Title—A purchaser of real estate is bound to know what the records disclose concerning the title, and if they indicate the existence of some outside condition by which it may be affected, he is bound to investigate and is charged with knowledge of the facts to which an investigation would lead. But if the records upon their face are complete, and show that the title is good, in the absence of information to the contrary from any other source, he may safely rely upon them.—*The Delta County Land and Cattle Co. v. Talcott*, 316.

Deeds of Trust—Release Deeds—Record—Innocent Purchaser—A release deed by the trustee in a deed of trust is such deed or conveyance as comes within the meaning of our recording act, and where, after the maturity of the notes secured by a deed of trust, the trustee executed to the owner of the equity of redemption a release deed which was placed on record and which recited that it was executed at the request of the payee of the notes and in consideration of their payment in full, when, in fact, the notes had not been paid, and the release was executed without the authority or knowledge of the holder of said notes, as between the holder of the notes and the owner of the equity of redemption, the release was fraudulent and void, but one who purchased from the owner for value without notice of the fact that the notes had not been paid, acquired a title free from the lien of the deed of trust.—*Ib.*

Bills and Notes—Innocent Purchaser—Mortgages—Where a loan company loaned money and took a deed of trust to secure

NOTICE—Continued.

the same and a part of the consideration was that it should pay off a former negotiable note and deed of trust on the same land, and did remit the money to pay off the same to the payee of the note, who caused a release to be executed by the trustee in the former deed of trust, but the note having been transferred before maturity, the payee converted the money and failed to pay it over to the holder, the company making the second loan was charged with notice of all that was disclosed by the former deed of trust, and stood in no better position than the payor of the note, and was not an innocent purchaser.—*Campbell et al v. The Equitable Securities Co.*, 417.

Mortgages—Foreclosure Sales—Postponement—Where a mortgage foreclosure sale was advertised for a certain day, and the property was not offered for sale on that day, but on the day following the sheriff proceeded to sell the property which was bid in by the mortgagee, and the certificate of sale stated that the sale was made on the day it was advertised to be sold, the sale was void, and a deed thereunder conveyed nothing, but the deed constituted a menace to mortgagee's right of redemption, and if he was unable to redeem he was entitled to have the property legally sold, and an action by him to set aside the sale and cancel the certificate and deed was erroneously dismissed.—*Brown v. Belles*, 529.

OFFICES AND OFFICERS:

Judgments—Law of the Case—Title to Office—Emoluments—In an action to try title to an office a judgment for respondent was reversed by the court of appeals, the opinion of the court stating that relator was lawfully appointed to the office and that his attempted removal and the appointment of respondent were void and that the judgment ought to have been one ousting respondent and putting the relator into possession. When the remittitur was filed in the lower court the term of office in controversy had expired and the parties stipulated that the judgment of the court of appeals should be made the judgment of the lower court and an order for such judgment was signed. Judgment was then entered for relator for costs without specifically awarding title to the office. In a subsequent action by relator against respondent to recover the fees and emoluments collected by respondent while wrongfully in possession of the office, the judgment in the former case was sufficient to establish plaintiff's right and he was entitled to recover.—*Jones v. Carver*, 484.

PARTIES:

Water Rights—Where a canal company sold water rights with a stipulation that when the capacity of the canal was sold, the ownership of the canal and other property and franchises of the company should vest in the water right owners and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operating the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Appeal Bonds—Action Upon—Several Damage—Injunction Bonds—Where an appeal bond is made payable to several appellees and any one of the appellees sustains damage through the taking of the appeal, even though such damage is several, such appellee may maintain a several action upon the bond therefor. And the same principle applies to an action upon an injunction bond.—*Austin v. Snider et al.*, 176.

Same—Where an appeal bond and an injunction bond were made payable to plaintiff and two other appellees one of whom was sued only as receiver, and whatever interest the receiver had was held for the benefit of plaintiff, and before action was commenced on the bonds said receiver was by the court discharge and pending the appeal the other payee in the bonds died, leaving plaintiff his sole heir at law, and no reason existed for the appointment of an administrator for the deceased payee and none was appointed, plaintiff was the only party interested in the recovery of damages upon said bonds and could maintain a several action thereon.—*Ib.*

Appeal Bonds—Action Upon—The obligee in an appeal bond died pending the appeal, and devised her entire estate to plaintiff charged with the support of her husband during his life. The husband was administrator with will annexed. No debts existed against the estate of testatrix. The husband died intestate, without any debts and leaving plaintiff as his only heir. No administrator was appointed for the husband's estate, nor was any one appointed to succeed him as administrator of his wife's estate. Held, not necessary to appoint an administrator to prosecute an

PARTIES—Continued.

action upon the appeal bond, but that such action could be prosecuted by the plaintiff in her own name.—*Austin v. Snider et al.*, 182.

Mandamus—Cities and Towns—Where the fire and police board of the city of Denver, by resolution which was duly recorded, appointed plaintiff a patrolman, and afterwards his name was erased from the record and another substituted, in an action of mandamus by plaintiff against the city and the fire and police board to compel the restoration of the record of the resolution of his appointment, the person whose name was substituted in the record was not a necessary or proper party to the proceeding.—*The City of Denver et al. v. The People ex rel. Burnett*, 190.

Evidence—Value of Services—In an action to recover for services, plaintiff is a competent witness to testify to the value of his services and may be permitted to answer the direct question of what his services were worth.—*Stevens v. Walton*, 440.

Judgments—Substitution of Administrator—Notice—Where a party defendant died pending suit and his administratrix was substituted as party defendant, and judgment rendered against her without any notice or summons having been served on her and without any appearance by her in the action, the judgment was void.—*Symes v. Charplot*, 463.

Choses in Action—Assignment—The assignee of a chose in action may maintain suit thereon in his own name before a justice of the peace.—*Forsyth v. Ryan*, 511.

PARTNERSHIP:

Bills and Notes—Pleading—In an action against a partnership firm upon a promissory note signed by the firm, an answer that a member of the firm executed the note for a purpose outside the partnership business, and without the authority of his co-partners, and that such facts were known to the payee and to the plaintiff before the note was endorsed to him, stated a good defense and it was error to sustain a demurrer thereto.—*King et al. v. Mecklenburg*, 312.

Evidence—In an action to charge defendant as a member of a partnership a newspaper article based upon an interview with defendant in which it was stated that defendant was a member of such partnership, was admissible in evidence, although the exact words used by defendant in the interview were not given, where from the evidence of the author of the article and defendant the jury would be justified in believing that the article was a substantially correct reproduction of the interview.—*Stevens v. Walton*, 440.

PARTNERSHIP—Continued.

Same—In an action to charge defendant as a member of a partnership, a newspaper article based upon an interview with defendant and stating that defendant and another had formed such partnership, a perusal of which led plaintiff to apply to the supposed partnership for employment, is admissible in evidence whether a correct reproduction of defendant's language or not, where it is shown that the defendant saw the article and knew that it resulted from an interview with him, and made no effort to have it corrected.—*Ib.*

PERSONAL INJURIES:

Negligence—Excessive Damage—In an action against a town for damage for personal injuries, where plaintiff, before the injury, was a strong, healthy woman, earning from \$1 to \$1.50 per day from her work, and by the injury she was rendered unfit to perform her ordinary work and is unable to earn anything, a verdict for \$2,000 will not be held excessive.—*The Town of Colorado City v. Smith*, 172.

PHYSICIANS:

Evidence—Confidential Communications—Statutory Construction—*Mill's Ann. Stats.*, section 4824, providing that "a physician or surgeon duly authorized to practice his profession under the laws of this state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," does not include physicians practicing outside of this state, and not authorized or licensed to practice under the laws of this state, and such unauthorized physicians are not incompetent to testify to such information.—*Head Camp Pacific Jurisdiction Woodmen of the World v. Loehner*, 247.

PLEADING:

Statute of Frauds—In an action for damage for breach of contract where the complaint fails to disclose whether or not the contract is in writing, if the defendant desires to avail himself of the statute of frauds, he must specially plead it.—*Baldwin et al. v. The Central Savings Bank*, 7.

Evidence—Damages—In an action for damages for the failure of defendant to deliver cattle according to his contract of sale, a complaint which set forth in a general way the expense and loss to plaintiff, might have been required to be made more specific upon motion, but, in the absence of such motion, evidence that plaintiff had paid out money for pasturage on which

PLEADING—Continued.

to put the cattle when gathered and employed men to assist in searching the range for them, and that such expense was incurred by agreement with defendant's agent who represented defendant in the sale, was admissible.—*Farrer v. Caster*, 41.

Practice—Trials—Discretion of Court—Reading Pleadings to Jury—Harmless Error—The details of the trial are largely within the discretion of the court, and it is not an abuse of that discretion to permit a defendant to read the pleadings to the jury where it does not appear that plaintiff was harmed by such readings.—*Wald v. Hobson*, 54.

Same—Objections—Where the defendant, in his opening statement, read to the jury the complaint and answer, if the plaintiff objected to the reading, he should have made his objection before the complaint was read. After the complaint was read to the jury, common fairness required the reading of the answer and an objection to its reading was properly overruled.—*Ib.*

Practice—Objections—An objection to the reading of a pleading to the jury without stating a reason for the objection is worthless, and it is not error to overrule it.—*Ib.*

Claims Against County—Illegality of Contract—Appropriation—In an action against a county upon a bill for printing official ballots, election notices and list of nominations, done at the request of the county, defendant cannot question its liability on the ground that no appropriation was made therefor prior to contracting the debt, unless such defense be specially pleaded and proved.—*The Board of County Commissioners of San Juan County v. Tulley*, 113.

Practice—Trespass—Motion to Make More Specific—Where a complaint against several defendants charged them with acting jointly in the commission of certain trespasses, either through themselves or others, plaintiff was not required to set out the evidence by which the ultimate facts were to be proven, and a motion should not be sustained to require the complaint to be made more specific because it did not designate the particular wrongful act done by each defendant, nor because it failed to allege a conspiracy between the defendants to do the acts charged, nor because it failed to allege that certain individuals who were alleged to have committed acts of trespass were agents of defendants in so acting.—*Commonwealth Co. v. Nunn et al.*, 117.

Same—Corporations—Where a complaint charges a corporation with the commission of a trespass, a motion should not be sustained to require the complaint to be made more specific be-

PLEADING—Continued.

cause it fails to allege through what particular officers, agents or employees of the corporation the trespass was committed.—*Ib.*

Practice—Redundant Matter—Motion to Strike—Where a complaint contains redundant matter, advantage cannot be taken thereof on motion to require the complaint to be made more specific, but the proper remedy is by motion to strike out.—*Ib.*

Claims Against Counties—Appropriation—In an action against a county by a physician for medical services and attendance to the pauper patients of the county under a contract with the board of county commissioners, it is not necessary for the complaint to allege an appropriation for that purpose prior to the execution of the contract, if such appropriation was necessary, its absence is a matter of defense to be pleaded and proved by defendant.—*Miller v. The Board of County Commissioners of Weld County*, 120.

Judgments—In an action upon a judgment a denial of any indebtedness puts nothing in issue.—*Harter v. Shull*, 162.

Judgments—Payment—In an action upon a judgment, an answer alleging payment of the obligation upon which the judgment was rendered prior to the recovery of the judgment states no defense to the action.—*Ib.*

Judgments—Fraud—In an action upon a judgment an answer which alleges that defendant employed an attorney to conduct his defense in the action in which the judgment was rendered, and expected him to introduce in evidence a receipt for the indebtedness sued upon, and to prove the payment thereof by certain named witnesses, and that defendant is informed and believes and upon such information and belief alleges that plaintiffs colluded and conspired with his attorney whereby said attorney did not make any defense and allowed a false and fraudulent judgment to be entered against defendant, is insufficient to charge fraud in procuring the judgment, and states no defense to the action.—*Ib.*

Practice—Amendments—Change of Cause of Action—An amendment to a complaint which changes the cause of action as stated in the original complaint from an equitable action to a legal one or vice versa, is not permissible.—*Gibbons v. The Denver Brokerage and Construction Co. et al.*, 167.

Replevin—Evidence—Statute of Frauds—In an action of replevin to recover property from an officer taken under an execution where plaintiff claims the property by purchase from the execution defendant, the defense that the sale to plaintiff was void because not followed by an immediate and continuous change of

PLEADING—Continued.

possession is admissible under a general denial of plaintiff's title, and it is not necessary that such defense be specially pleaded.—*Israel, U. S. Marshall, v. Day*, 200.

Corporations—Stockholders—Right to Purchase Stock—In an action by one stockholder against another, a complaint which alleged that the corporation had a certain amount of capital stock for sale of which each stockholder had a right to purchase a part in proportion to the stock held by him, and that defendant caused to be issued and sold to himself a large number of shares in excess of his proportional part, but which failed to show that defendant had not acquired a right to such excess by purchase from some other stockholder or otherwise, is insufficient to allege a wrongful conversion of the stock by defendant.—*Crosby v. Stratton*, 212.

Same—In an action by one stockholder against another a complaint which alleges that the corporation had a certain amount of capital stock for sale, of which each stockholder had a right to purchase a part in proportion to the amount of stock held by him, but that defendant caused to be issued to himself a large number of shares in excess of the number he was entitled to purchase, and thereby the plaintiff was unable to obtain the stock he was entitled to, although he was at all times ready, able and desirous to subscribe and pay for the same, but which fails to allege that he ever offered to subscribe for the same and was refused, and which fails to show what disposition was made of the balance of the stock which was more than sufficient to have supplied plaintiff, is insufficient to state a cause of action against any person as the allegations are entirely consistent with the forfeiture or abandonment of his right to purchase.—*Ib.*

Change of Venue—Appearance—Filing Demurrer—Waiver—A defendant entitled to remove a cause for trial to another county on the ground that he resides and was served with a summons in such other county, does not waive his right of removal by filing a demurrer to plaintiff's complaint at the time he presents his application for removal.—*Smith et al. v. The Post Printing and Publishing Co.*, 238.

Change of Venue—Application—Negating Exceptions—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint af-

PLEADING—Continued.

firmatively shows that the cause does not come within any of the exceptions.—*Ib.*

Separate Counts—The duplicate statement of the same cause of action and the same facts in different counts is usually bad pleading, but a party has a right to plead and prove all the facts upon which his rights depend, and where separate counts, although alleging but a single cause of action, are based upon different statements of fact, the separate statements being alleged for the purpose of meeting the exigencies of the proofs, the pleader should not be deprived of the privilege of proving any facts upon which he bases his right of recovery by compelling him to elect upon which count he will proceed.—*The Crissey & Fowler Lumber Co. et al. v. The Denver & Rio Grande Railroad Co. et al.*, 275.

Same—Railroads—Negligence—Damage by Fire—Statutory and Common-Law Liability—In an action against a railroad company to recover damages for property destroyed by fire, where plaintiff in one count alleged a statutory liability without reference to the question of negligence, and in another count alleged a common-law liability based wholly upon defendant's negligence, the complaint stated two distinct causes of action, and it was prejudicial error to compel plaintiff to elect upon which count he would proceed, and to strike the other count from the complaint.—*Ib.*

Separate Counts—Railroads—Negligence—Damage by Fire—In an action against a railroad company to recover damages for property destroyed by fire, the complaint contained one count predicated solely upon defendant's negligence in causing and setting out a fire upon its right of way, and in and about its depot and platform, and in negligently causing and permitting it to escape from its right of way to plaintiff's property. Another count charged a liability for the results of fire caused in the operation of defendant's line of road, and specified various alleged negligent acts in such operation, particularly the dangerous condition of the right of way at the place where the fire originated by permitting inflammable and combustible material to accumulate thereon, by which the fire was communicated to plaintiff's property, and the negligent construction of defendant's depot and platform, and a failure to provide and maintain suitable appliances to extinguish fire. Another count alleged the negligent placing and leaving of a car of powder on defendant's tracks in its yards in violation of a city ordinance, and the negligent failure to remove the car of powder from its exposed position when

NONSUIT—Continued.

rested, defendant moved that the jury be directed to return a verdict for defendant and the court announced that it would sustain it, whereupon plaintiffs asked leave to take a voluntary nonsuit without prejudice to the commencement of another action which was granted and judgment was entered accordingly. The judgment was one in favor of the defendant and against the plaintiffs from which no appeal by defendant would lie, and an appeal by defendant from such judgment must be dismissed, but as the court would have jurisdiction to review the judgment on writ of error the cause will be redocketed on error.—*The Florence & Cripple Creek Railroad Co. v. Maloney*, 526.

NOTICE:

Water Rights—Conveyances—Mortgages—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Cities and Towns—Negligence—Defective Sidewalks—In an action against a city for personal injuries caused by falling on a defective sidewalk, it must be shown that the city had knowledge of the defect, or that it had existed such a length of time as to impart notice, and had not exercised reasonable diligence to repair the defect.—*The City of Boulder v. Weger*, 69.

Same—Evidence—In an action against a city for personal injuries caused by falling on a defective wooden walk, evidence that the wooden walks of the city generally were in a defective condition does not establish the particular defect in question, nor charge the defendant with notice of such particular defect.—*Ib.*

Negligence—Evidence—Letters—In an action against a city for injuries caused by falling on a dangerous cross-walk, a letter written by the inspector of public works, in the line of his duty, concerning the walk, was admissible in evidence after his death,

PLEADING—Continued.

a defense to the note in the hands of the first endorsee is no defense as against plaintiff.—*Ib.*

Amendment—Discretion—Appellate Practice—Where a pleading is demurred to, the pleader has a right to amend as of course, but when this right has been exercised by one amendment, any further amendment is within the discretion of the trial court, and unless it clearly appears that such discretion has been abused, a ruling of the trial court denying such amendment will not be disturbed by a court of review.—*Ib.*

Practice—Mandamus—Demurrer—A demurrer to the answer in mandamus proceedings relates back to the alternative writ, and if that writ is insufficient it should be so adjudged.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

Estates of Decedents—Judgments—Where a defendant in an action died pending the action, and his administratrix was substituted and judgment entered against her as such administratrix without any notice or summons having been served upon her and without any appearance by her in the action, in an action by her in the same court to vacate such judgment, an allegation in her complaint of a meritorious defense to the action in which the judgment was rendered is not essential.—*Symes v. Charplot*, 463.

Appellate Practice—Abstract of Record—Sufficiency or Complaint—Where a cause was tried upon complaint, answer and replication, an objection to the sufficiency of the complaint will not be considered by the appellate court where the abstract of record fails to inform the court as to the contents of the answer and replication, since the defects, if any, in the complaint may have been cured by the subsequent pleading.—*Gerspach et al. v. Barhyte*, 489.

PRACTICE IN CIVIL ACTIONS:

Instructions—Mathematical Computation—Where the amount of recovery, if any, is merely a matter of mathematical computation, it is not error for the court to make the computation and instruct the jury, if they find for the plaintiff, they should estimate the damage at a specified sum.—*Baldwin et al. v. The Central Savings Bank*, 7.

Instructions—Measure of Damage—Where the court had already instructed the jury that if they found for plaintiff they should estimate the damage at a specified sum, an instruction requiring the jury to estimate the damage at a specified sum, if refused, is not error to refuse to give instructions re-

PRACTICE IN CIVIL ACTIONS—Continued.

quested if they are substantially given in other instructions.—*Ib.*

Tender—In an action for damage for breach of contract in failing to deliver certain securities where the complaint alleged a demand of the securities and an offer to pay the agreed price and a refusal by defendant to deliver the securities on the ground of the invalidity of the contract and defendant's answer admitted the demand and offer to pay but denied any agreement of any kind with plaintiff, a tender by plaintiff of the amount agreed to be paid for the securities was not necessary to sustain plaintiff's action.—*Ib.*

Statute of Frauds—Pleading—In an action for damage for breach of contract, where the complaint fails to disclose whether or not the contract is in writing, if the defendant desires to avail himself of the statute of frauds, he must specially plead it.—*Ib.*

Trials—Discretion of Court—Reading Pleadings to Jury—Harmless Error—The details of the trial are largely within the discretion of the court, and it is not an abuse of that discretion to permit a defendant to read the pleadings to the jury where it does not appear that the plaintiff was harmed by such reading. *Wald v. Hobson*, 54.

Same—Objections—Where the defendant, in his opening statement, read to the jury the complaint and answer, if the plaintiff objected to the reading, he should have made his objection before the complaint was read. After the complaint was read to the jury, common fairness required the reading of the answer, and an objection to its reading was properly overruled.—*Ib.*

Objections—An objection to the reading of a pleading to the jury without stating a reason for the objection is worthless, and it is not error to overrule it.—*Ib.*

Summons—Appearance—Copy of Complaint—Taxing Cost—Where a defendant procures from the clerk a copy of a complaint and taxes the cost thereof against the plaintiff as authorized by section 45, *Mills' Annotated Code*, it is a general appearance in the action, and waives all defects of service of summons.—*Brockway v. The W. & T. Smith Co.*, 96.

Dismissal—Notice—Waiver—Appearance—Where the court of its own motion called a case as within a rule for dismissal for want of prosecution, and plaintiff's counsel had case set for hearing on the question as to whether or not it should be dismissed, and voluntarily appeared at such hearing and without objection went into the trial of the question, he waived objection that no notice was served upon him.—*Carnahan v. Connolly*, 98.

PRACTICE IN CIVIL ACTIONS—Continued.

Adverse Suits—Dismissal—The dismissal of an adverse suit without a verdict is not obnoxious to section 2326, U. S. Rev. Stats., which provides that, if title is not established in either party, the jury shall so find.—*Ib.*

Pleading—Illegality of Contract—In an action against a county upon a bill for printing official ballots, election notices and list of nominations, done at the request of the county, defendant cannot question its liability on the ground that no appropriation was made therefor prior to contracting the debt, unless such defense be specially pleaded and proved.—*The Board of County Commissioners of San Juan County v. Tulley*, 113.

Evidence—Public Printing—Opinion of Witness—Cross-Examination—In an action against a county for the reasonable value of printing official ballots, election notices and list of nominations, where a witness testified, giving his opinion as to the value of the work, it was error to refuse the defendant permission to cross-examine such witness as to the amount of labor and material which went into the work.—*Ib.*

Pleading—Trespass—Motion to make More Specific—Where a complaint against several defendants charged them with acting jointly in the commission of certain trespasses, either through themselves or others, plaintiff was not required to set out the evidence by which the ultimate facts were to be proven, and a motion should not be sustained to require the complaint to be made more specific because it did not designate the particular wrongful act done by each defendant, nor because it failed to allege a conspiracy between the defendants to do the acts charged, nor because it failed to allege that certain individuals who were alleged to have committed acts of trespass were agents of defendants in so acting.—*Commonwealth Co. v. Nunn et al.*, 117.

Same—Corporations—Where a complaint charges a corporation with the commission of a trespass, a motion should not be sustained to require the complaint to be made more specific because it fails to allege through what particular officers, agents or employees of the corporation the trespass was committed.—*Ib.*

Pleading Redundant Matter—Motion to Strike—Where a complaint contains redundant matter, advantage cannot be taken thereof on motion to require the complaint to be made more specific, but the proper remedy is by motion to strike out.—*Ib.*

Appeals from County to District Court—Trial De Novo—Res Judicata—Where a cause is appealed from the county court to the district court, the trial in the district court is de novo. Where

PRACTICE IN CIVIL ACTIONS—Continued.

a plaintiff sued in county court on two counts and was nonsuited as to one and recovered judgment on the other, and defendant appealed to the district court, the judgment of the county court is not *res judicata* as to the count nonsuited, and plaintiff is entitled to a new trial upon both counts.—*Mattice et al. as Trustees of The Pueblo Water Works v. Wilcoxon*, 160.

Pleading—Amendments—Change of Cause of Action—An amendment to a complaint which changes the cause of action as stated in the original complaint from an equitable action to a legal one or vice versa, is not permissible.—*Gibbons v. The Denver Brokerage and Construction Co. et al.*, 167.

Evidence—Objections—Objections to the admission of evidence without assigning any reasons therefor do not entitle a party to have such objections considered.—*The Town of Colorado City v. Smith*, 172.

Contributory Negligence—Question for Jury—In an action against an electric light company, the question as to whether plaintiff, a twelve-year-old boy, was guilty of contributory negligence in attempting to replace an insulator on its bracket, is one for the jury to determine.—*Walters v. The Denver Consolidated Electric Light Co.*, 190.

Change of Venue—Appearance—Filing Demurrer—Waiver—A defendant entitled to remove a cause for trial to another county on the ground that he resides and was served with summons in such other county, does not waive his right of removal by filing a demurrer to plaintiff's complaint at the time he presents his application for removal.—*Smith et al. v. The Post Printing and Publishing Co.*, 238.

Change of Venue—Time for Filing Application—An application to remove a cause to another county for trial on the ground that defendant resides and was served with summons in such other county is in apt time if filed within the time fixed by the summons for defendant to appear and plead.—*Ib.*

Change of Venue—Application—Negating Exceptions—Pleading—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions.—*Ib.*

Cities and Towns—Action for Violation of Ordinance—Com-

PRACTICE IN CIVIL ACTIONS—Continued.

plaint—In an action before a police magistrate against a defendant for violating a town ordinance, the only process required is a summons. A complaint is unnecessary, and where a defendant appeared and went to trial upon a complaint, and the evidence did not depart from the cause laid in the complaint, and the presence of the complaint worked no prejudice to defendant, he cannot object to the insufficiency of the complaint.—*Saner et al. v. The People*, 307.

Same—Appeal—An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the complaint so far as they affected the procedure before the magistrate.—*Ib.*

Pleading—Amendment—Discretion—Appellate Practice—Where a pleading is demurred to, the pleader has a right to amend as of course, but when this right has been exercised by one amendment, any further amendment is within the discretion of the trial court, and unless it clearly appears that such discretion has been abused, a ruling of the trial court denying such amendment will not be disturbed by a court of review.—*King et al. v. Mecklenburg*, 312.

Mandamus—Demurrer—A demurrer to the answer in mandamus proceedings relates back to the alternative writ, and if that writ is insufficient it should be so adjudged.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

Bills and Notes—Counterclaims—In an action upon a joint and several promissory note, one of the makers may interpose as a counterclaim an indebtedness upon contract due him from plaintiff.—*Canfield et al. v. Arnett*, 426.

Appeal Bonds—Action Upon—Concurrent Remedies—Election—Where a cause was appealed from the county court to the district court and affirmed, and an appeal was taken from the judgment of the district court to the supreme court where it was affirmed, actions may be maintained upon both appeal bonds limited, however, to one satisfaction, and it was not error to refuse to require the obligee of the bonds to elect between actions pending upon the two bonds.—*Duncan v. Thomas*, 522.

PRESUMPTIONS:

Bills and Notes—Endorsement—Presumption—In an action upon a promissory note by an endorsee, the law presumes that the endorsement was made before maturity, and that the endorsee acquired the note in good faith for a valuable consideration in the usual course of business and without notice of any circum-

PRESUMPTIONS—Continued.

stance impeaching its validity, and an answer that the note was procured by fraud of the payee states no defense in the absence of averments overcoming these presumptions.—*King et al. v. Mecklenburg*, 312.

Tax Sales—Redemption—Burden of Proof—Property sold for taxes cannot be redeemed by one having no interest therein. When application is made to redeem, it is the duty of the treasurer to determine whether the applicant has such interest in the property as will entitle him to redeem, and where a redemption is effected, the presumption of law is in favor of the judgment of the treasurer in allowing the redemption, and the applicant will be presumed to have had the requisite interest, and the burden is on the person attacking such redemption on that ground to rebut such presumption by evidence.—*Hartman et al. v. Reid et al.*, 407.

Appellate Practice—Abstract of Record—Evidence—Where the abstract of record does not contain all the evidence, it will be presumed that the evidence was sufficient to sustain the judgment.—*Ib.*

Evidence—Ownership—Houses—In an action for damages for removing and converting houses used as residences, where the evidence established title in plaintiff to the lots on which the residences stood, plaintiff is presumptively the owner of the houses in the absence of evidence to the contrary.—*Pedroni v. Eppstein*, 424.

Evidence—Appellate Practice—A ruling of the trial court excluding a circular offered in evidence will be presumed to have been correct when the abstract fails to advise the appellate court what the contents of the circular were.—*Stevens v. Walton*, 440.

PRINCIPAL AND AGENT:

Evidence—Declarations of Agent—The declarations of an agent are not admissible in evidence against his principal unless made with reference to business in which he is authorized to act, and at the time of its transaction.—*Baldwin et al. v. The Central Savings Bank*, 7.

Ostensible Authority of Agent—Where a person holds out another to the public as having a general authority to act for him in the particular business in which he is engaged, third persons may safely deal with the agent in the transaction of such business. But no matter how extensive the agent's authority may be in the transaction of his principal's business, it is confined to that business, and the principal is not bound by any act of the agent

PRINCIPAL AND AGENT—Continued.

outside the boundary by which the business is circumscribed.—*The Gates Iron Works v. The Denver Engineering Works Co.*, 15.

Agent to Sell Not Authorized to Buy—The general agent of a manufacturing company whose business is to manufacture and sell mining machinery, has no apparent authority to buy such machinery for his principal. And one who sold machinery to such agent knowing his principal was engaged in the manufacture and sale of such machinery must, in order to bind the manufacturing company, show that the purchase was specially authorized by the company.—*Ib.*

Same—Custom and Usage—Evidence—The mode of transacting business by an agent may be affected, but the character or nature of the business cannot be changed, by custom or usage. In an action against a manufacturing company, located in Chicago and engaged in the manufacture and sale of mining machinery, for the value of mining machinery purchased by its agent in the city of Denver, a custom, amongst agencies handling mining machinery in Denver of purchasing goods from local companies is inadmissible as tending to establish the agent's authority to purchase the machinery for his principal.—*Ib.*

Authority of Agent—Evidence—Harmless Error—In an action against a company engaged in the manufacture and sale of mining machinery for the value of machinery purchased by its agent, it was error to exclude evidence offered by defendant that it knew nothing of the purchase having been made for it and that its agent had no authority to make the purchase, but where plaintiff failed to prove any authority of the agent to make the purchase, the error was harmless, as there was no issue to submit to the jury.—*Ib.*

Contracts—Estoppel—Where plaintiff entered into a written contract with an agent of defendant for the purchase of cattle, and defendant received a copy of the contract in which the agent described himself as the agent of defendant, and also received an advance payment on the cattle, which he retained, and afterwards accepted payment for some of the cattle delivered under the contract, defendant is estopped to deny that the person assuming to act as his agent was authorized to do so.—*Farrer v. Caster*, 41.

Same—Disclaimer of Ownership—Where plaintiff purchased cattle from an agent of defendant as belonging to defendant, and defendant accepted and retained money that was paid as part of the purchase price he cannot evade liability on his contract for a failure to deliver the cattle as agreed, by disclaiming ownership of the cattle.—*Ib.*

PRINCIPAL AND AGENT—Continued.

Contracts—Specific Performance—Real estate agents authorized to sell certain lots subject to the approval of the owner, negotiated a sale to a purchaser who knew of the limitation upon their power, a payment was made and the agents executed a receipt therefor containing a statement of the terms of sale in duplicate. The owner refused to approve the sale unless a certain condition was inserted, and interlined the condition in its copy and endorsed its approval on the amended copy, and returned it to the agents with instructions to insert the same condition in the copy delivered to the purchaser. The purchaser refused to sign the amended receipt, but continued to deposit money in bank as the installments came due under the original receipt. The owner directed the bank to return the purchase money, which was declined by the purchaser, who offered to pay the balance of the purchase price and demanded a deed. Held, that there was no contract for the sale of the lots that would support an action for specific performance.—*Schausten v. The Cripple Creek Gold Mines and Land Co.*, 106.

Notice—Notice received by an agent affecting the business he is authorized to transact while he is engaged in its transaction is notice to his principal.—*Schollay v. Moffitt-West Drug Co.*, 126.

Ratification—Knowledge of all the material facts is essential to the ratification by a principal of the unauthorized acts of an agent.—*Ib.*

Same—Purchase and Sale of Goods by Agent—Where defendant, a married woman, who owned a drug store conducted by her husband as her manager, in person notified plaintiff, a wholesale drug company, through its traveling salesman, that she would not purchase any goods from plaintiff, and afterwards the same salesman sold and delivered to her husband as her manager certain bills of goods, if defendant had no knowledge of the purchase of the goods by her husband, nor of the delivery thereof at the drugstore, nor of the sale thereof and receipt of the proceeds for her by her employees, there could be no ratification by her, and without a ratification there was no sale to her, and an action against her upon a contract for goods sold and delivered must fail.—*Ib.*

Sales—Ratification—Instructions—In an action for goods sold to defendant's unauthorized agent in several different bills evidenced by orders made at different times by the agent, an instruction that an appropriation by defendant of any portion of the articles purchased would render defendant liable for the

PRINCIPAL AND AGENT—Continued.

whole, was erroneous. An appropriation of the goods or a portion of the goods purchased under one order or contract would not be a ratification of a purchase under an entirely separate and different contract.—*Ib.*

Sales—Authority of Agent—Ratification—In order to recover for goods sold to defendant's agent after defendant had notified plaintiff that she would buy no goods from it, it must be shown either that the goods were purchased by defendant's authority or that she ratified the purchase with full knowledge of the facts.—*Ib.*

Bills and Notes—Payments—Mortgages—Release—A promissory note and deed of trust securing the same were executed to a securities company in Colorado, but the note and coupons were made payable at a bank in New York. The note was transferred to another company soon after its execution. The payor remitted the money to the payee, the Colorado company, to pay the coupons as they fell due, so that the money should reach its office several days before maturity, and always received an acknowledgment of the receipt of the money and later received the coupon. One of the letters acknowledging receipt of the money by the payee company stated that the coupon would be sent when received from the holder. The holder of the note collected all the coupons at the New York bank except the last, which was collected from the Colorado company. The payor paid the principal to the Colorado company, who converted the money and failed to pay it to the holder. Held, that the payor was charged with notice of the transfer of the note, and that payment to the Colorado company was not a satisfaction of the note, and a release of the trust deed by the trustee at the request of the Colorado company was void.—*Campbell et al. v. The Equitable Securities Co.*, 417.

Commissions—Quantum Meruit—In an action by a real estate agent for commission where he sues for the reasonable value of his services, it is immaterial whether or not there was an agreement as to the amount of the commission.—*Williams v. Bishop et al.*, 503.

Same—Evidence—In an action by a real estate agent for commission where the evidence showed that he was entitled to commission, and he testified that his services were worth a certain sum, and his evidence as to value was uncontradicted, he was entitled to judgment for that amount.—*Ib.*

Same—Evidence examined and held sufficient to entitle a real estate agent to commission on a sale of property.—*Ib.*

RAILROADS:

Negligence—Damage by Fire—Statutory and Common-Law Liability—In an action against a railroad company to recover damages for property destroyed by fire, where plaintiff in one count alleged a statutory liability without reference to the question of negligence, and in another count alleged a common-law liability based wholly upon defendant's negligence, the complaint stated two distinct causes of action, and it was prejudicial error to compel plaintiff to elect upon which count he would proceed, and to strike the other count from the complaint.—*The Crissey & Fowler Lumber Co. et al. v. The Denver & Rio Grande Railroad Co. et al.*, 275.

Pleading—Separate Counts—Negligence—Damage by Fire—In an action against a railroad company to recover damages for property destroyed by fire, the complaint contained one count predicated solely upon defendant's negligence in causing and setting out a fire upon its right of way, and in and about its depot and platform, and in negligently causing and permitting it to escape from its right of way to plaintiff's property. Another count charged a liability for the results of fire caused in the operation of defendant's line of road, and specified various alleged negligent acts in such operation, particularly the dangerous condition of the right of way at the place where the fire originated by permitting inflammable and combustible material to accumulate thereon, by which the fire was communicated to plaintiff's property, and the negligent construction of defendant's depot and platform, and a failure to provide and maintain suitable appliances to extinguish fire. Another count alleged the negligent placing and leaving of a car of powder on defendant's tracks in its yards in violation of a city ordinance, and the negligent failure to remove the car of powder from its exposed position when the fire originated, whereby the firemen of the city were deterred and prevented from extinguishing the fire. Held, that the different counts are not repetitions of the same facts so as to be obnoxious to the code provision prohibiting unnecessary repetition, and that it was prejudicial error to require plaintiff to elect one count upon which to proceed and to strike the others from the complaint.—*Ib.*

Same—Statutory and Common-Law Liability—In an action against a railroad company to recover damages for property destroyed by fire where the complaint alleged a statutory liability and a common-law liability in separate counts, and plaintiff was compelled to elect upon which count to proceed, and having

RAILROADS—Continued.

elected to proceed upon the common-law count was permitted to amend it so as to include the allegations of a statutory liability, a ruling of the court restricting plaintiff to the common-law remedy was prejudicial error.—Ib.

Negligence—Damage by Fire—Evidence—In an action against a railroad company to recover damages for property destroyed by fire where, in addition to the allegation of negligence in operating the road and starting the fire, plaintiff alleged negligence in permitting inflammable and combustible material to accumulate and remain upon the right of way, whereby the fire was communicated to the plaintiff's property, and during several days of the trial plaintiff was not permitted to introduce any evidence as to the dangerous condition of the right of way, although such testimony was offered, the court ruling that plaintiff was restricted in its right of recovery to a showing of negligence in the defective construction or careless handling of defendant's locomotives, such ruling of the court was prejudicial error, and its prejudicial effect was not cured by the court subsequently ruling otherwise and permitting the evidence to be introduced.—Ib.

Same—In an action against a railroad company to recover damages for property destroyed by fire, testimony as to the condition of an engine belonging to defendant, and which was shown to have passed on the track close to the place where the fire originated a few minutes before its discovery, by a witness who examined the engine a week or two weeks after the fire, was admissible, and its exclusion was error.—Ib.

Same—In an action against a railroad company to recover damages for property destroyed by fire, where the only engine that could have set the fire was identified, evidence of the setting out of fires at other times and places by other engines belonging to defendant was properly excluded.—Ib.

Negligence—Damage by Fire—Evidence—In an action against a railroad company to recover damages for property destroyed by fire, the fact of the origin of the fire should be established like any other material fact in the case. The jury within certain limits may be permitted to infer the fact upon circumstances proved, but such proof should be amply sufficient to rebut the probability of the fire having originated in any other way, considering the facts, circumstances and conditions of the particular case, as disclosed by the evidence.—Ib.

Negligence—Burden of Proof—Passengers—The general rule

RAILROADS—Continued.

is that the party charging negligence must prove it. But where a passenger on a railroad is injured in an accident to the machinery, appliances, or means provided for his transportation, he is only required to prove the fact of the injury and show that it was caused by the failure or insufficiency of some of the agencies provided for the carriage, and the burden is then transferred to the carrier to show its freedom from fault and that the accident could not have been prevented by the utmost skill, care and prudence.—*The Denver & Rio Grande Railroad Co. v. Fotheringham*, 410.

Same—Instructions—Plaintiff, a passenger on a railroad car, was injured by the sudden jerking of the car while stopping at a station, which caused the plaintiff to be violently thrown against the door-facing and at the same time caused the open door of the car to suddenly swing shut, which caught and injured plaintiff's hand. Held, that the injury was not caused by any accident to the train or car or to the machinery or appliances used by defendant for the transportation of passengers such as would relieve plaintiff of the burden of proving that the injury was chargeable to defendant's negligence, and an instruction which relieved plaintiff of such burden and placed upon defendant the burden of showing that the injury was not chargeable to its negligence, was reversible error.—*Ib.*

Fire—Evidence—In an action against a railroad company for damage caused by fire, evidence that immediately after the passage of defendant's train over its track through plaintiff's farm the fire started at its track, and that prior to the passage of the train no fire was there, was sufficient to warrant a submission to the jury of the question whether the fire was chargeable to the passing train and to sustain a verdict that it was.—*The Burlington and Missouri River Railroad Co. in Nebraska v. Burch*, 491.

Corporations—Names—Misnomer—Where a railroad company for convenience designated a portion of its line by a different name than that of the company, and the name so used is not the legal name of any corporation, and an action was brought against it under the designated name and summons was served upon the company and it appeared and defended the action without making any objection to the misnomer, a judgment in the case is as effective against the company as if it had been correctly named, if the plaintiff move properly.—*Ib.*

REPLEVIN:

Pleading—Evidence—Statute of Frauds—In an action of re-

REPLEVIN—Continued.

plevin to recover property from an officer taken under an execution where plaintiff claims the property by purchase from the execution defendant, the defense that the sale to plaintiff was void because not followed by an immediate and continuous change of possession is admissible under a general denial of plaintiff's title, and it is not necessary that such defense be specially pleaded.—*Israel, U. S. Marshal, v. Day, 200.*

Sales—Statute of Frauds—Instructions—In an action of replevin to recover property from an officer taken under execution where plaintiff claimed to have purchased the property from the execution debtor and defendant claimed that the sale to plaintiff was void because not followed by an immediate delivery and continuous change of possession, an instruction which told the jury that the controlling question was whether or not the property at the time it was taken under execution was owned by and in the possession of plaintiff or the execution debtor, and that if the property was that of plaintiff their verdict should be for plaintiff, was erroneous and misleading, because it failed to distinguish between a title good as between the parties to the sale and one good as against the creditors of the seller.—*Ib.*

Sales—Change of Possession—Instructions—In a contest of title to personal property as between a purchaser and the creditors of the seller, an instruction, that, to make the sale valid as against creditors of the seller, the change of possession must be open, notorious and visible, but that "to constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another if the buyer does such acts as make visible signs of his ownership and maintains that relation to the property purchased which owners of property generally sustain to their own property," is erroneous in failing to require the sale to be accompanied by immediate delivery, and the change of possession required by the instruction is not such actual change as is required by the statute. The instruction is also defective in failing to explain in what cases removal of the property is not required, and in failing to define what acts of ownership would be sufficient.—*Ib.*

Termination of Right of Possession—Return—Where a number of cattle consisting of cows, yearlings and calves were taken under writ of replevin and defendant by answer and cross-complaint claimed the right of possession of all of the cattle under a lease, and ownership of one-half of the yearlings and calves as the natural increase during the continuance of the lease, and

REPLEVIN—Continued.

before the trial term of the lease had expired, a judgment for the defendant for the return of all the cattle or for their value was erroneous.—*Legere v. Stewart*, 472.

Verdict—Judgment—Return—In an action of replevin, a verdict for defendant, "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return on the same," will not support a judgment for the return of the property. The attempt to award a return was not a finding that defendant was entitled to a return as required by code. Power to award a return belongs to the court after the jury has found that the party is entitled to it.—*Ib.*

Damages—Excessive—In an action of replevin for 40 cows, 30 yearlings and calves and 4 horses, all valued at \$2,000, where the property was delivered to plaintiff and detained by him for six months when defendant recovered judgment for its return, an award of \$800.00 damages for its detention was excessive where defendant alleged no special damages.—*Ib.*

RES JUDICATA:

Practice—Appeals from County to District Court—Trial De Novo—Where a cause is appealed from the county court to the district court, the trial in the district court is de novo. Where a plaintiff sued in county court on two counts and was nonsuited as to one and recovered judgment on the other, and defendant appealed to the district court, the judgment of the county court is not res judicata as to the count nonsuited, and plaintiff is entitled to a new trial upon both counts.—*Mattice et al., as Trustees of the Pueblo Water Works, v. Wilcoxon*, 160.

RULES OF COURT:

Appellate Practice—Bills of Exception—Where an action was dismissed under a rule of court for want of prosecution, and the bill of exceptions contains neither the rule nor the facts upon which the court acted in ordering the dismissal, an assignment of error based upon the order of dismissal will not be considered.—*Carnahan v. Connolly*, 98.

Appellate Practice—Bills of Exception—Motion for New Trial—Where a case was dismissed under a certain rule of court, the court rule cannot be brought before the appellate court for review by including a copy thereof in a motion for a new trial and incorporating the motion in the bill of exceptions. The statement in the motion that it contains a copy of the rule is no evidence of the existence or contents of the rule.—*Ib.*

RULES OF COURT—Continued.

Appellate Practice—Dismissal—Presumptions—A rule of the trial court providing for the dismissal of causes for failure of prosecution is valid and the court has power to enforce it. And where the facts to which the court applied the rule in dismissing a case are not before the appellate court it cannot say that the trial court abused its discretion or violated the law applying the rule.—*Ib.*

Appellate Practice—Supplemental Record—Leave will not be granted to a party to file a supplemental record, after the case has been decided and pending a motion for rehearing to bring before the court a rule of the trial court where the briefs of the adverse party contended that the rule was not before the court and the party making the request had ample warning of the contention that the rule was not in the record and ample opportunity to amend the record before the cause was determined.—*Ib.*

Appellate Practice—Failure to File Assignment of Errors—Dismissal—The rules of the court of appeals requiring an appellant to assign errors in writing at the time of filing the transcript and providing that in case of failure to assign error the appeal may be dismissed, do not necessarily require a dismissal in all cases, because of a failure to assign errors within the time fixed. An appeal will not be dismissed because of a failure to assign errors within the time fixed, where the appellant makes a showing tending to explain and excuse the failure, and where it appears that no material delay nor prejudice to appellee has been caused thereby.—*Moynahan v. Perkins*, 450.

SALARIES AND FEES:

District Attorneys—Trials Before Justices of the Peace—The allowance or disallowance of fees of a district attorney for the trial or examination of any criminal case before a justice of the peace is wholly within the discretion of the board of county commissioners, and is not reviewable by the courts, and where the board had disallowed such fees it was error for the district court to allow them and enter judgment therefor against the county.—*The Board of County Commissioners of Yuma County v. Pendleton*, 159.

Water Divisions—Salary of Superintendent—Liability of County—Evidence—In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district,

SALARIES AND FEES—Continued.

and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for short periods of floods or freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any liability against the county.—*Chapman v. The Board of County Commissioners of Phillips County*, 236.

License Inspectors—Mandamus—The city council of the city of Denver will not be compelled by mandamus to make an appropriation to pay the salaries of license inspectors in accordance with an estimate furnished by the fire and police board where such inspectors are not provided for in the charter and nothing appears in the alternative writ to indicate what such inspectors are or how the office was or would be created, or how the inspectors were or would be appointed.—*Hover et al. v. The People ex rel. Adams et al.*, 375.

Judgments—Law of the Case—Title to Office—Emoluments—In an action to try title to an office a judgment for respondent was reversed by the court of appeals, the opinion of the court stating that relator was lawfully appointed to the office and that his attempted removal and the appointment of respondent were void and that the judgment ought to have been one ousting respondent and putting the relator into possession. When the remittitur was filed in the lower court the term of office in controversy had expired and the parties stipulated that the judgment of the court of appeals should be made the judgment of the lower court, and an order for such judgment was signed. Judgment was then entered for relator for costs without specifically awarding title to the office. In a subsequent action by relator against respondent to recover the fees and emoluments collected by respondent while wrongfully in possession of the office, the judgment in the former case was sufficient to establish plaintiff's right and he was entitled to recover.—*Jones v. Carver*, 484.

SALES:

Agent to Sell Not Authorized to Buy—The general agent of a manufacturing company whose business is to manufacture and sell mining machinery, has no apparent authority to buy such machinery for his principal. And one who sold machinery to such agent knowing his principal was engaged in the manufacture

SALES—Continued.

and sale of such machinery must, in order to bind the manufacturing company, show that the purchase was specially authorized by the company.—*The Gates Iron Works v. The Denver Engineering Works Co.*, 15.

Purchase and Sale of Goods by Agent—Ratification—Where defendant, a married woman, who owned a drugstore conducted by her husband as her manager, in person notified plaintiff, a wholesale drug company, through its traveling salesman, that she would not purchase any goods from plaintiff, and afterwards the same salesman sold and delivered to her husband as her manager certain bills of goods, if defendant had no knowledge of the purchase of the goods by her husband, nor of the delivery thereof at the drugstore, nor of the sale thereof and receipt of the proceeds for her by her employees, there could be no ratification by her, and without a ratification there was no sale to her, and an action against her upon a contract for goods sold and delivered must fail.—*Schollay v. Moffitt-West Drug Co.*, 126.

Principal and Agent—Ratification—Instructions—In an action for goods sold to defendant's unauthorized agent in several different bills evidenced by orders made at different times by the agent, an instruction that an appropriation by defendant of any portion of the articles purchased would render defendant liable for the whole was erroneous. An appropriation of the goods or a portion of the goods purchased under one order or contract would not be a ratification of a purchase under an entirely separate and different contract.—*Ib.*

Principal and Agent—Authority of Agent—Ratification—In order to recover for goods sold to defendant's agent after defendant had notified plaintiff that she would buy no goods from it, it must be shown either that the goods were purchased by defendant's authority or that she ratified the purchase with full knowledge of the facts.—*Ib.*

Instructions—Not Responsive to Issues—In an action of replevin for a wagon where plaintiffs claimed that their vendor purchased the wagon from defendant, and defendant denied that he sold the wagon, but claimed that he had only temporarily loaned it to plaintiff's vendor, and there was no evidence tending to show that defendant invested said vendor with apparent ownership and title to the wagon, or permitted him to hold himself out to the world as the owner, it was error to instruct the jury that, although defendant had not sold the wagon to said vendor, if he invested him with apparent ownership and permitted him to

SALES—Continued.

hold himself out to the world as the owner, and on the strength of such apparent ownership, plaintiffs purchased it for a valuable consideration, they should find for plaintiff's.—*Gray v. Sharp et al.*, 139.

Same—Fraud—In an action of replevin where the only issue was as to whether defendant had sold the wagon in controversy to plaintiff's vendor or had only loaned it, it was error to instruct the jury upon the question of fraudulent conveyance of personal property.—*Ib.*

Replevin—Pleading—Evidence—Change of Possession—In an action of replevin to recover property from an officer taken under an execution where plaintiff claims the property by purchase from the execution defendant, the defense that the sale to plaintiff was void because not followed by an immediate and continuous change of possession is admissible under a general denial of plaintiff's title, and it is not necessary that such defense be specially pleaded.—*Israel, U. S. Marshal, v. Day*, 200.

Replevin—Instructions—In an action of replevin to recover property from an officer taken under execution where plaintiff claimed to have purchased the property from the execution debtor and defendant claimed that the sale to plaintiff was void because not followed by an immediate delivery and continuous change of possession, an instruction which told the jury that the controlling question was whether or not the property at the time it was taken under execution was owned by and in the possession of plaintiff or the execution debtor, and that if the property was that of the plaintiff their verdict should be for the plaintiff, was erroneous and misleading, because it failed to distinguish between a title good as between the parties to the sale and one good as against the creditors of the seller.—*Ib.*

Replevin—Change of Possession—Instructions—In a contest of the title to personal property as between a purchaser and the creditors of the seller, an instruction, that, to make the sale valid as against creditors of the seller, the change of possession must be open, notorious and visible, but that "to constitute a visible and actual change of possession it is not necessary that the property be actually moved from one locality to another if the buyer does such acts as make visible signs of his ownership and maintains that relation to the property purchased which owners of property generally sustain to their own property," is erroneous in failing to require the sale to be accompanied by immediate delivery, and the change of possession required by the

SALES—Continued.

instruction is not such actual change as is required by the statute. The instruction is also defective in failing to explain in what cases removal of the property is not required, and in failing to define what acts of ownership would be sufficient.—*Ib.*

Mortgages—Judicial Foreclosure—In a judicial foreclosure of a mortgage the sheriff alone is authorized to execute the decree of foreclosure and sell the land, and it is error for the court to appoint a commissioner, other than the sheriff, to make such foreclosure sale, where such appointment is at the time objected to.—*Blitz et al. v. Moran*, 253.

Chattel Mortgages—Bills and Notes—Plaintiffs agreed with their debtor to purchase his stock of goods and gave him their promissory note for the amount of the agreed purchase price over and above his debt to them and took from him a bill of sale. On the same day another creditor attached the goods and plaintiffs and the debtor made another agreement whereby they abandoned the sale and plaintiffs paid off the attachment claim and added it to their own claim, and took the debtor's note and a chattel mortgage on the goods to secure it. The debtor agreed to return plaintiff's note, but failed to do so, and indorsed it to defendants who had full knowledge of the transaction between plaintiffs and the debtor. Defendants and plaintiffs were compelled to pay the note. Held, that plaintiffs and the debtor had a right to abandon their agreement of sale and substitute therefor the chattel mortgage. That the entire proceeding constituted but one transaction and a formal resale from plaintiffs to the debtor was not necessary. That plaintiffs' note indorsed to defendants was without consideration and defendants were liable to plaintiffs for the amount plaintiffs were required to pay thereon.—*Falke et al. v. Brule et al.*, 499.

Mortgages — Foreclosure — Postponement — Notice — Where a mortgage foreclosure sale was advertised for a certain day, and the property was not offered for sale on that day, but on the day following the sheriff proceeded to sell the property which was bid in by the mortgagee, and the certificate of sale stated that the sale was made on the day it was advertised to be sold, the sale was void, and a deed thereunder conveyed nothing, but the deed constituted a menace to mortgagee's right of redemption, and if he was unable to redeem he was entitled to have the property legally sold, and an action by him to set aside the sale and cancel the certificate and deed was erroneously dismissed.—*Brown v. Belles*, 529.

SHERIFFS:

Mortgages — Judicial Foreclosure — Sales — In a judicial foreclosure of a mortgage the sheriff alone is authorized to execute the decree of foreclosure and sell the land, and it is error for the court to appoint a commissioner, other than the sheriff, to make such foreclosure sale, where such appointment is at the time objected to.—Blitz et al. v. Moran, 253.

SPECIFIC PERFORMANCE: See **CONTRACTS**.

STATUTE OF FRAUDS:

Pleading—In an action for damage for breach of contract, where the complaint fails to disclose whether or not the contract is in writing, if the defendant desires to avail himself of the statute of frauds, he must specially plead it.—Baldwin et al. v. The Central Savings Bank, 7.

STATUTORY CONSTRUCTION:

Judgments—Executions—Limitation—The act of 1891 (Session laws, 1891, page 246), amending section 1835, General Statutes, and providing that from and after ten years from the entry of final judgment in any court of this state it shall be considered as satisfied in full unless revived as provided by law, is prospective only, and does not apply to judgments rendered prior to the passage of the act. Execution may issue on judgments rendered prior to the adoption of said act at any time within twenty years from the entry of such judgments.—Jones et al. v. The Stockgrowers National Bank, 79.

Evidence — Confidential Communications — Physicians — Mills' Ann. Stat., section 4824, providing that "a physician or surgeon duly authorized to practice his profession under the laws of this state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," does not include physicians practicing outside of this state, and not authorized or licensed to practice under the laws of this state, and such unauthorized physicians are not incompetent to testify to such information.—Head Camp Pacific Jurisdiction Woodmen of the World v. Loeher, 247.

Trustees—Action by—Session laws 1897, page 248, providing that any person trading or doing business under the firm name of trustee shall file with the county clerk an affidavit setting forth the full names and addresses of all the parties who are represented by the trustee, and in default shall not be permitted to pro-

STATUTORY CONSTRUCTION—Continued.

ecute any suits for collection of his debts until such affidavit shall be filed, does not apply to actions in tort.—*Pedroni v. Epstein*, 424.

SUBROGATION:

Insurance—Statutory Liability—Where property which is insured is destroyed by fire under such circumstances that the owner has an action for damage against the person causing the fire, and the owner collects the insurance, the insurance company may be subrogated to the right of the owner to an action against the person responsible for the fire, whether the right of action be statutory or at common law, but where the action is statutory it must be brought in the name of the owner.—*The Crissey & Fowler Lumber Co. et al. v. The Denver & Rio Grande Railroad Co. et al.*, 275.

SUMMONS:

Appearance—Copy of Complaint—Taxing Cost—Where a defendant procures from the clerk a copy of a complaint and taxes the cost thereof against the plaintiff as authorized by section 45, *Mills' Annotated Code*, it is a general appearance in the action, and waives all defects of service of summons.—*Brockway v. The W. & T. Smith Co.*, 96.

Appellate Practice—Final Judgment—Denying Default—An order quashing service of summons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court.—*Ib.*

Cities and Towns—Action for Violation of Ordinance—Appeal—An appeal to the county court from a judgment of a police magistrate convicting defendant of a violation of a town ordinance cured any defects in the summons.—*Saner et al. v. The People*, 307.

Judgments—Action to Vacate—Direct Attack—An action brought in the court where a judgment was rendered to vacate such judgment on the ground that no notice or summons was served on the judgment defendant, is a direct attack on the judgment sought to be vacated.—*Symes v. Charplot*, 463.

Same—Pleading—Estates of Decedents—Where a defendant in an action died pending the action, and his administratrix was substituted and judgment entered against her as such administratrix without any notice or summons having been served upon her and without any appearance by her in the action, in an action by her in the same court to vacate such judgment, an al-

SUMMONS—Continued.

legation in her complaint of a meritorious defense to the action in which the judgment was rendered is not essential.—*Ib.*

Judgments—Parties—Substitution of Administrator—Notice—Where a party defendant died pending suit, and his administratrix was substituted as party defendant, and judgment rendered against her without any notice or summons having been served on her and without any appearance by her in the action, the judgment was void.—*Ib.*

Estates of Decedents—Judgments—Collateral Attack—Where pending administration of an estate a judgment against the administratrix was tendered to the county court for filing and classification, an objection to the filing and classification on the ground that the administratrix was substituted as party defendant in the action and judgment rendered against her without any notice or summons having been served upon her and without any appearance in the cause by her, was not a collateral attack on the judgment, and the county court had jurisdiction and it was its duty to have heard the defense of the administratrix to the judgment.—*Symes v. The People*, 466.

TAXES:

Interest and Penalties—Interest and penalties collected on delinquent state tax belong to the state. Where such interest and penalties on delinquent state tax have been collected by a county treasurer and retained by the county, an action may be maintained by the state against the county to recover such interest and penalties.—*The Board of County Commissioners of Prowers County v. The People*, 519.

TAX SALES:

Redemption—Presumptions—Burden of Proof—Property sold for taxes cannot be redeemed by one having no interest therein. When application is made to redeem, it is the duty of the treasurer to determine whether the applicant has such interest in the property as will entitle him to redeem, and where a redemption is effected, the presumption of law is in favor of the judgment of the treasurer in allowing the redemption, and the applicant will be presumed to have had the requisite interest, and the burden is on the person attacking such redemption on that ground to rebut such presumption by evidence.—*Hartman et al. v. Reid et al.*, 407.

Certificates—Assignment—Burden of Proof—In an action by one claiming as assignee of a certificate of purchase at a tax-

TAX SALES—Continued.

sale, where the assignment is put in issue by the answer, the burden is on the claimant to establish such assignment by evidence, and in the absence of such evidence defendant is entitled to judgment.—Ib.

TENDER:

Practice—Contracts—In an action for damage for breach of contract in failing to deliver certain securities where the complaint alleged a demand of the securities and an offer to pay the agreed price and a refusal by defendant to deliver the securities on the ground of the invalidity of the contract and defendant's answer admitted the demand and offer to pay, but denied any agreement of any kind with plaintiff, a tender by plaintiff of the amount agreed to be paid for the securities was not necessary to sustain plaintiff's action.—*Baldwin et al. v. The Central Savings Bank*, 7.

TROVER:

Possession—Title—To sustain an action of trover there must be in plaintiff at the time of the supposed conversion a lawful possession, or the right to immediate possession. There must be an invasion of a legal, as contradistinguished from an equitable, right. There can be no conversion of property, the title to which consists only in the right at some future time to acquire it by purchase.—*Crosby v. Stratton*, 212.

Corporations—Stockholders—Right to Purchase Stock—The right of a stockholder to purchase a certain proportion of a certain amount of stock to be sold by the corporation does not give the stockholder a right to any specific shares of stock, and would not support an action in trover against another stockholder, who purchased more than his proportional part of the stock, for the excess of stock so purchased.—Ib.

TRUSTS AND TRUSTEES:

Statutory Construction—Session laws 1897, page 248, providing that any person trading or doing business under the firm name of trustee shall file with the county clerk an affidavit setting forth the full names and addresses of all the parties who are represented by the trustee, and in default shall not be permitted to prosecute any suits for collection of his debts until such affidavit shall be filed, does not apply to actions in tort.—*Pedroni v. Epstein*, 424.

VENDORS' LIENS:

Conveyances—Where one person conveys real estate to another

VENDORS' LIENS—Continued.

in such manner that the legal title vests in the latter, and the consideration of the sale is not paid or secured, equity allows the grantor a lien upon the land for its payment.—*Salomon v. Martin et al.*, 60.

Contracts—Conveyances—A land owner contracted with two other parties to sell certain land at a fixed price to be paid by them to him in installments at fixed times. The two parties were to have control and handling of the land, and were to plat it and expend not to exceed a certain sum in preparing it for sale as an addition to the city. The amount thus expended to be deducted from the proceeds of the first sales, and to be equally borne by the three parties. The owner agreed to execute deeds to purchasers of parcels of the land and to hold the securities arising from such sales until he was paid the agreed price. All proceeds of sale over and above the stipulated price to be equally divided between the three parties. Held, that the contract was not a sale of land by the owner to the two parties such as would give the owner a vendor's lien on the land for the purchase price, and an assignee of the interest of the owner in the contract acquired no such lien.—*Ib.*

Same—Where a land owner entered into a contract with two other parties, whereby the two were to plat the land into a city addition and sell the same, the owner to make deeds to the purchasers, and after paying the owner a stipulated price, the remainder of the proceeds of sale to be equally divided amongst the three, there could be no vendor's lien in favor of the owner alone for the unpaid purchase price of any lot or parcel of land sold under the terms of said contract.—*Ib.*

VENUE:

Change of Venue—Appearance—Filing Demurrer—Waiver—A defendant entitled to remove a cause for trial to another county on the ground that he resides and was served with summons in such other county, does not waive his right of removal by filing a demurrer to plaintiff's complaint at the time he presents his application for removal.—*Smith et al. v. The Post Printing and Publishing Co.*, 238.

Change of Venue—Time for Filing Application—An application to remove a cause to another county for trial on the ground that defendant resides and was served with summons in such other county is in apt time if filed within the time fixed by the summons for defendant to appear and plead.—*Ib.*

VENUE—Continued.

Change of Venue—Application—Negating Exceptions—Pleading—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions.—*Ib.*

Contracts—Guaranty—Goods Sold and Delivered—An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator, is an action upon the guaranty contract, and not an action for goods sold and delivered, and the code provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply.—*Ib.*

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Appellate Practice—Bill of Exceptions—Change of Venue—An assignment of error to a ruling of the court denying an application for change of venue will not be considered where the facts upon which it was based are not within the bill of exceptions.—*Duncan v. Thomas*, 522.

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dict for defendant, "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return of the same," will not support a judgment for the return of the property. The attempt to award a return was not a finding that defendant was entitled to a return as required by code. Power to award a return belongs to the court after the jury has found that the party is entitled to it.—*Legere v. Stewart*, 472.

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WATER RIGHTS:

Conveyances—Mortgages—Notice—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Parties—Where a canal company sold water rights with a stipulation that when the capacity of the canal was sold, the ownership of the canal and other property and franchises of the company should vest in the water right owners and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operat-

WATER RIGHTS—Continued.

ing the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system.—Ib.

Conveyances—Ownership of Canal and Reservoir—Where a canal company sold water rights with a stipulation that, when the capacity of the ditch was sold, the title to the canal should pass to the water right owners, and the company oversold the capacity of the canal, the title to an undeveloped reservoir connected with the canal and constructed by the canal company passed with the canal to, and vested in, the water right owners.—Ib.

Conveyances—A water right, even though it may be appurtenant to land, is the subject of property, and may be conveyed with or without the land.—Crippen, Trustee, v. Comstock et al., 89.

Sams—Mortgages—After Acquired Water Rights—A deed of trust conveying land together with all ditches and water rights thereunto belonging without any specific mention or description of the ditch or water right, does not convey an after acquired water right and ditch not in existence at the time the trust deed was executed.—Ib.

Same—Appurtenances—Plaintiff took a deed of trust conveying certain land, together with all ditches and water rights thereunto belonging. Afterwards the grantor constructed a ditch and used the water therefrom at all times in irrigation of the land conveyed by deed of trust to plaintiff. About the time the ditch was completed the grantor executed to defendant a deed of trust to land adjoining that conveyed to plaintiff and in the deed of trust conveyed the ditch by particular description, and the water right thereby acquired. Defendant had no notice of any intention on the part of the grantor to appropriate and use the water so as to become an appurtenant to the land conveyed by the first deed of trust. Held, that the ditch and water right did not become an appurtenant to the land on which the water was used so as to vest in plaintiff, but that the express conveyance thereof to defendant vested in defendant the superior title.—Ib.

Mortgages—Application for Loan—After Acquired Water Right

WATER RIGHTS—Continued.

—Notice—Where a deed of trust conveyed land together with all ditches and water rights thereto belonging without any specific mention of an after acquired water right and subsequently constructed ditch, statements made in an unrecorded application for the loan or to the mortgagee in reference to such ditch and water right could have no force or effect against a subsequent mortgagee to whom the ditch and water right were expressly conveyed by deed of trust where said second mortgagee had no knowledge of such statements.—*Ib.*

Contracts—Diversion of Water—Plaintiff contracted with defendant to enlarge defendant's ditch and to run water from his own into defendant's ditch, defendant to own two-thirds and plaintiff one-third of the ditch, and water flowing therein: provided if either party should fail to furnish water in proportion to his interest he should be allowed only an amount proportioned to the volume supplied by him. Held, that the right of either party to water in proportion to the amount turned into the ditch contemplated the capacity of the ditch to carry all the water furnished by both, and that plaintiff could not by filling the ditch beyond his interest so that it would not carry the water defendant was entitled to run therein deprive defendant of his two-thirds interest in the water flowing in the ditch.—*Paterson v. Nurnberg et al.*, 223.

Division of Water—Contracts—Where two parties by contract use a ditch in common, the water to be divided in proportion to the amount furnished to the ditch by each, the amount of water either party is entitled to withdraw from the ditch should be determined by the amount that runs through the ditch, and not by the amount turned in, where the capacity of the ditch at its upper end is greater than that at the lower.—*Ib.*

Water Divisions—Salary of Superintendent—Liability of County—Evidence—In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district, and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for short periods of floods and freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any lia-

WATER RIGHTS—Continued.

bility against the county.—*Chapman v. The Board of County Commissioners of Phillips County*, 236.

Appropriation of Waste Waters—Where an irrigation ditch at times ran a surplus of water, which surplus it discharged at its terminus into a natural drain, one who appropriated such surplus or waste water after it was discharged from the ditch acquired a right only to whatever water flowed from the ditch after the ditch company had supplied its own wants and necessities, and did not acquire a vested right to any specific quantity of water, and acquired no right to interfere with the water flowing in the ditch or any of its laterals, and the ditch company was under no obligation to permit any specific quantity of water to be discharged at the terminus of its ditch.—*Mabee et al. v. The Platte Land Co.*, 476.

WILLS:

Estates of Decedents—Probate—Appeal Bonds—In an appeal to the district court from a proceeding in the county court probating a will, where there was no executor or administrator of the estate, the appeal bond properly ran to the estate of the deceased.—*Blackman v. Edsall et al.*, 429.

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Same—Verdict of Jury—In the contest of a will on the ground of undue influence where the province of the jury is to draw conclusions from conceded or undisputed facts the verdict of the jury should not be disregarded except for grave reasons clearly apparent.—*Ib.*

Same—In the contest of a will on the ground of undue influence all circumstances which tend to throw any light upon the question should be considered by the jury.—*Ib.*

Same—Instructions—Instructions on the issue of undue influence in the execution of a will discussed and approved.—*Ib.*

WITNESSES: See EVIDENCE.

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in such manner that the legal title vests in the latter, and the consideration of the sale is not paid or secured, equity allows the grantor a lien upon the land for its payment.—*Salomon v. Martin et al.*, 60.

Contracts—Conveyances—A land owner contracted with two other parties to sell certain land at a fixed price to be paid by them to him in installments at fixed times. The two parties were to have control and handling of the land, and were to plat it and expend not to exceed a certain sum in preparing it for sale as an addition to the city. The amount thus expended to be deducted from the proceeds of the first sales, and to be equally borne by the three parties. The owner agreed to execute deeds to purchasers of parcels of the land and to hold the securities arising from such sales until he was paid the agreed price. All proceeds of sale over and above the stipulated price to be equally divided between the three parties. Held, that the contract was not a sale of land by the owner to the two parties such as would give the owner a vendor's lien on the land for the purchase price, and an assignee of the interest of the owner in the contract acquired no such lien.—*Ib.*

Same—Where a land owner entered into a contract with two other parties, whereby the two were to plat the land into a city addition and sell the same, the owner to make deeds to the purchasers, and after paying the owner a stipulated price, the remainder of the proceeds of sale to be equally divided amongst the three, there could be no vendor's lien in favor of the owner alone for the unpaid purchase price of any lot or parcel of land sold under the terms of said contract.—*Ib.*

VENUE:

Change of Venue—Appearance—Filing Demurrer—Waiver—A defendant entitled to remove a cause for trial to another county on the ground that he resides and was served with summons in such other county, does not waive his right of removal by filing a demurrer to plaintiff's complaint at the time he presents his application for removal.—*Smith et al. v. The Post Printing and Publishing Co.*, 238.

Change of Venue—Time for Filing Application—An application to remove a cause to another county for trial on the ground that defendant resides and was served with summons in such other county is in apt time if filed within the time fixed by the summons for defendant to appear and plead.—*Ib.*

VENUE—Continued.

Change of Venue—Application—Negating Exceptions—Pleading—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions.—*Ib.*

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Contracts—Guaranty—Place of Trial—The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence.—*Ib.*

Appellate Practice—Bill of Exceptions—Change of Venue—An assignment of error to a ruling of the court denying an application for change of venue will not be considered where the facts upon which it was based are not within the bill of exceptions.—*Duncan v. Thomas*, 522.

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VERDICTS—Continued.

dict for defendant, "We find that he was entitled to the possession of the property described in the complaint at the institution of this suit, and we award him a return of the same," will not support a judgment for the return of the property. The attempt to award a return was not a finding that defendant was entitled to a return as required by code. Power to award a return belongs to the court after the jury has found that the party is entitled to it.—*Legere v. Stewart*, 472.

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WATER RIGHTS:

Conveyances—Mortgages—Notice—Where a canal company conveyed water rights by contracts which provided that, when the capacity of the canal had been sold, the canal and other properties and franchises of the company were to become the property of the water right owners, which contracts and deeds were recorded in the counties along the line of the canal, and lateral ditches were taken out and lands in cultivation along the entire line of the canal, and the books of the canal company would have disclosed that the entire capacity of the canal had been sold, a mortgagee who took a mortgage upon the canal and property of the company, after the capacity had been sold, was charged with notice that the capacity of the canal had been sold, and that the company had nothing to incumber at the date of the mortgage.—*The New La Junta and Lamar Canal Co. v. Kreybill*, 26.

Parties—Where a canal company sold water rights with a stipulation that when the capacity of the canal was sold, the ownership of the canal and other property and franchises of the company should vest in the water right owners and by a decree of court the canal was conveyed to a new company organized by said water right owners for the purpose of managing and operat-

WATER RIGHTS—Continued.

ing the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagees to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagees from further attempting to obtain payment thereof from the property of the canal system.—Ib.

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Mortgages—Application for Loan—After Acquired Water Right

WATER RIGHTS—Continued.

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WATER RIGHTS—Continued.

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Same—Instructions—Instructions on the issue of undue influence in the execution of a will discussed and approved.—*Ib.*

WITNESSES: See EVIDENCE.

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VENUE:

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Change of Venue—Time for Filing Application—An application to remove a cause to another county for trial on the ground that defendant resides and was served with summons in such other county is in apt time if filed within the time fixed by the summons for defendant to appear and plead.—*Ib.*

VENUE—Continued.

Change of Venue—Application—Negating Exceptions—Pleading—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in the code whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions.—*Ib.*

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WATER RIGHTS—Continued.

ing the property, and the directors of the new company conspired and operated with the holder of a mortgage on the canal system executed by the old company after it had sold the entire capacity of its canal to water rights owners, to enable said mortgagee to enforce its invalid mortgage, the water right owners were proper parties to bring an action to cancel said mortgage and to restrain said directors and mortgagee from further attempting to obtain payment thereof from the property of the canal system.—Ib.

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Mortgages—Application for Loan—After Acquired Water Right

WATER RIGHTS—Continued.

—Notice—Where a deed of trust conveyed land together with all ditches and water rights thereto belonging without any specific mention of an after acquired water right and subsequently constructed ditch, statements made in an unrecorded application for the loan or to the mortgagee in reference to such ditch and water right could have no force or effect against a subsequent mortgagee to whom the ditch and water right were expressly conveyed by deed of trust where said second mortgagee had no knowledge of such statements.—*Ib.*

Contracts—Diversion of Water—Plaintiff contracted with defendant to enlarge defendant's ditch and to run water from his own into defendant's ditch, defendant to own two-thirds and plaintiff one-third of the ditch, and water flowing therein; provided if either party should fail to furnish water in proportion to his interest he should be allowed only an amount proportioned to the volume supplied by him. Held, that the right of either party to water in proportion to the amount turned into the ditch contemplated the capacity of the ditch to carry all the water furnished by both, and that plaintiff could not by filling the ditch beyond his interest so that it would not carry the water defendant was entitled to run therein deprive defendant of his two-thirds interest in the water flowing in the ditch.—*Paterson v. Nurnberg et al.*, 223.

Division of Water—Contracts—Where two parties by contract use a ditch in common, the water to be divided in proportion to the amount furnished to the ditch by each, the amount of water either party is entitled to withdraw from the ditch should be determined by the amount that runs through the ditch, and not by the amount turned in, where the capacity of the ditch at its upper end is greater than that at the lower.—*Ib.*

Water Divisions—Salary of Superintendent—Liability of County—Evidence—In an action against a county to recover its pro rata share of the salary of the superintendent of irrigation of a water division, where the county is not mentioned by name in the act creating the water division or the one creating the water district, and the evidence showed that no lands are irrigated in the county, and that there are no natural streams of running water sufficient to irrigate from in the county, that there is a dry creek in the county bearing the name of one mentioned in the statute creating the division, but that except for short periods of floods and freshets, it does not contain enough water to irrigate from, the evidence was insufficient to establish any lia-

WATER RIGHTS—Continued.

bility against the county.—*Chapman v. The Board of County Commissioners of Phillips County*, 236.

Appropriation of Waste Waters—Where an irrigation ditch at times ran a surplus of water, which surplus it discharged at its terminus into a natural drain, one who appropriated such surplus or waste water after it was discharged from the ditch acquired a right only to whatever water flowed from the ditch after the ditch company had supplied its own wants and necessities, and did not acquire a vested right to any specific quantity of water, and acquired no right to interfere with the water flowing in the ditch or any of its laterals, and the ditch company was under no obligation to permit any specific quantity of water to be discharged at the terminus of its ditch.—*Mabee et al. v. The Platte Land Co.*, 476.

WILLS:

Estates of Decedents—Probate—Appeal Bonds—In an appeal to the district court from a proceeding in the county court probating a will, where there was no executor or administrator of the estate, the appeal bond properly ran to the estate of the deceased.—*Blackman v. Edsall et al.*, 429.

Contests—Undue Influence—Evidence—In the contest of a will on the ground of undue influence, the evidence required to establish the undue influence need not be of that direct, affirmative and positive character, which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.—*Ib.*

Same—Verdict of Jury—In the contest of a will on the ground of undue influence where the province of the jury is to draw conclusions from conceded or undisputed facts the verdict of the jury should not be disregarded except for grave reasons clearly apparent.—*Ib.*

Same—In the contest of a will on the ground of undue influence all circumstances which tend to throw any light upon the question should be considered by the jury.—*Ib.*

Same—Instructions—Instructions on the issue of undue influence in the execution of a will discussed and approved.—*Ib.*

WITNESSES: See EVIDENCE.

Ex. H. C. C.
8-11-04.

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